TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 122.

EDWARD C. CARRIGAN, ADMINISTRATOR OF HELEN M. MACDONALD, DECEASED, APPELLANT,

vs.

JOHN SHEPARD, HENRY NORWELL, AND ROBERT FERGUSON, AS SHEPARD, NORWELL & COMPANY.

No. 123.

JOHN SHEPARD, HENRY NORWELL, AND ROBERT FERGUSON, AS SHEPARD, NORWELL & COMPANY, APPELLANTS,

vs.

EDWARD C. CARRIGAN, ADMINISTRATOR OF HELEN M. MACDONALD, DECEASED.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 16, 1872.

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1 UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-two, before the honorable Horace Gray, associate justice, and the honorable John Lowell, circuit judge.

In Equity.

HELEN M. MACDONALD, Complainant,
v.
JOHN SHEPARD *et at.*, Defendants.

2 The bill of complaint in this cause was filed in the clerk's office on the seventh day of August, A. D. 1876, and was duly entered at the May term of this court, A. D. 1876, and is in the words and figures following:

3 *Bill of Complaint.* [*Filed August* 7, 1876.]

Helen Marie Macdonald, of Boston, in said district, brings this her bill of complaint against John Shepard, Henry Norwell, and Robert Ferguson, all of Boston, in said district, doing business under the firm-name and style of Shepard, Norwell & Company. And thereupon your oratrix complains and says, that she being the original and first inventor of a new and useful improvement in dress protectors, fully described in the letters patent hereinafter mentioned, which was not known before her said invention thereof, and which had not been, at the time of her application for said patent, in public use, or on sale, more than two years, with her consent or allowance, on the 29th day of September, A. D. 1874, upon due application, did obtain letters patent therefor in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, bearing date the day and year aforesaid, whereby there was secured to her, her heirs and assigns, for the term of seventeen (17) years from and after the 29th day of Sep-
4 tember, A. D. 1874, the full and exclusive right and liberty of making, using, and vending to others to be used, the said improvement in dress protectors as by said letters patent, in court to be produced, will fully appear. And your oratrix further shows that her said patent was amended by filing in the said Patent Office a "disclaimer to that part of the claim in said specification" which is in the words following, to wit, "as a new article of manufacture, a skirt facing," and thereby limiting said claim as follows: "As a new article of manufacture, a skirt protecter, having a fluted or plaited border bound with or composed of enameled cloth or other water-proof material, substantially as and for the purpose set forth," which said disclaimer was dated on the 4th day of November, A. D. 1874, and filed in the said Patent Office on the 9th day of said November.

And your oratrix further shows unto your honor that the validity of said letters patent granted to her has been fully established by a judicial decree. That on the 13th of November, A. D. 1874, your oratrix filed her bill of complaint against S. M. Blackmer and Albert A. Mandell, in the United States circuit court for the district of Massachusetts, praying for an injunction and other relief in equity against said Blackmer & Mandell for infringement of said patent; to which bill of complaint the said Blackmer & Mandell filed their answer denying the validity of said letters patent, and alleging, among other defences, that said Macdonald was not the original and first inventor thereof, and setting up that many other persons in the United States made and used said invention before your oratrix's invention, and that the same had been described previously in patents and publications. Whereupon such proceedings were had that evidence was taken by both parties upon all the points at issue, and the cause was fully argued before the said circuit court before the honorable Judge Shepley, by George E. Betton for complainant, and Causten Browne for defendants; and thereupon, to wit, in April, 1876, said court rendered its decision upon all the points at issue and ordered judgment and a final decree in favor of the complainant, and a perpetual injunction to be issued against said Blackmer & Mandell, enjoining them from infringing upon said letters patent, as by a duly authenticated copy of said decree, ready to be produced, will more fully appear.

And your oratrix further shows that the excusive right and liberty aforesaid has been, and still is, of great value and profit to your oratrix; yet the defendants, well knowing the premises, without her consent, and in violation of said letters patent and the rights of your oratrix, and utterly disregarding the same, have sold to be used, and still do sell to be used, in said district, a large number of said patented protectors, but how many your oratrix cannot state, but prays that the defendants may discover and set forth; and thereby defendants have infringed and still do infringe upon the exclusive rights and privileges so intended to be secured to your oratrix by the letters patent aforesaid.

And your oratrix has requested the said defendants to desist from selling said patented protectors to be used, and to account with and pay over to your oratrix the profits made by said defendants by reason of said unlawful selling of the same, and all damages the claimant has sustained thereby, and such additional amount of damages as the court may see fit to order and adjudge. But now so it is, may it please your honor, the said defendants wholly refuse so to do, contrary to equity and good conscience, and to the manifest wrong and injury of your oratrix in the premises.

To the end, therefore, that the said defendants may, if they can, show why your oratrix should not have the relief herein prayed, and may, under oath, and according to their and each of their best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the premises; and more especially may answer, discover, and set forth the number of pieces or dozens of pieces sold by said defendants to be

used since the date of said patent, containing said patented improvement or any substantial part thereof; and that said defendants may be ordered to account for and pay over to your oratrix all gains and profits realized from the unlawful selling of said protectors, and all damages the complainant has sustained thereby, and such additional amount of damages as the court may see fit to order and adjudge, and may be restrained by an injunction, to be issued out of the honorable court, from selling to be used any of said protectors embracing said improvement or any substantial part thereof so patented as aforesaid; and that they may also be enjoined
6 and instructed as aforesaid, during the pending of said suit, and for such other and further relief in the premises as the nature of the case may require and to your honor shall seem meet:

May it please your honor to grant unto your oratrix, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna, to be directed to said John Shepard, Henry Norwell, and Robert Ferguson, commanding them, and each of them, at a certain time and under a certain penalty therein, to be limited, personally to be and appear before your honor and this honorable court, then and there to answer unto this bill of complaint, and to do and receive what to your honor shall seem meet in the premises.

HELEN M. MACDONALD.

B. F. BUTLER,
E. L. BARNEY,
Of Counsel.

This cause was thence continued to the October term of this court, A. D. 1876, when the following answer was filed:

Answer. [*Filed Oct.* 16, 1879.]

The answer of John Shepard, Henry Norwell, and Robert Ferguson, defendants, to the bill of complaint of Helen Marie Macdonald, the above-named complainant.

These defendants, now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception that can or may be had or taken to the many errors, insufficiencies, and imperfections in the said bill of complaint contained, for answer thereunto, or unto so much thereof as they are advised it is material or necessary for them to make answer unto, answering, say: That they are informed and believe, and therefore admit, that letters patent of the United States were granted to the complainant, and a disclaimer thereunder afterwards filed by her, as mentioned in said bill of complaint; but whether or not such proceedings were had on application for said patent, or on filing said disclaimer, as mentioned in said bill of complaint, or what proceedings, if any, were had or taken on said application or disclaimer, these defend-
7 ants do not know, and are not informed, save by said bill of complaint, and leave the complainant to make such proof

thereof as she may be advised it is material or necessary for her to make.

These defendants, further answering, say that they do not know, and are not informed, save by said bill of complaint, respecting a suit therein mentioned as having been brought by said complainant in this court against Messrs. Blackmer & Mandell for an infringement of said patent, or what proceedings were had or taken in said suit, and leave the complainant to make such proof concerning said several matters and things as she may be advised it is material or necessary for her to make. But these defendants state that they were not parties to said suit, and had nothing to do, directly or indirectly, with the defence thereof or with the proceedings therein.

And these defendants deny, on information and belief, that they, or any or either of them, have sold or caused to be sold skirt protectors the same, or substantially the same, in construction and operation as the skirt protectors which were adjudged by the court in said suit against said Blackmer & Mandell to infringe the complainant's patent.

And these defendants, further answering, on information and belief, say that all, or nearly all, the skirt protectors which have been sold by them since the date of the complainant's patent have been obtained of or furnished to them by G. Seidenberg & Co., of New York, who manufacture and sell said skirt protectors under and according to two certain letters patent of the United States for improvements therein, now owned by Miss Sallie V. Day, of Elizabeth, New Jersey, one of which patents was granted to Thos. B. DeForest for his improvements in skirt protectors, and bears date January 15, 1867, and is marked No. 61172; and the other of said patents was granted to said Sallie V. Day for improvements in skirt protectors, and bears date March 23, 1875, and is marked No. 161,012. That, as these defendants are informed and believe, the said firm of G. Seidenberg & Co. are licensees under each of said last-mentioned patents, and have full right and liberty from said owner thereof to make, use, and sell skirt protectors made in accordance with said last-mentioned patents, and each of them.

8 And these defendants, on information and belief, deny that the skirt protectors, or any or either of them, adjudged by the court in said suit against said Blackmer & Mandell to infringe the complainant's patent were the same, or substantially the same, in construction or operation as the skirt protectors which have been made and sold under and according to said two last-mentioned patedts, or either of of them, and furnished to and sold by the defendant as aforesaid. And these defendants deny, on information and belief, that this court, or any other court, has at any time adjudged that skirt protectors made the same or substantially the same as described and shown in said DeForest and Day patents, or either of them, infringe the complainant's patent.

And these defendants deny, on information and belief, that they have at any time since the date of the complainant's patent sold for use any skirt protectors made the same or substantially the same as

described and claimed therein. And on like information and belief they deny that they have infringed her said patent or in any way violated her rights thereunder; and they deny that they, or any or either of them, now have or ever have had any intention of making, using, or selling skirt protectors in infringement of her said patent or in violation of her rights under the same.

And these defendants, further answering, say, on information and belief, that said alleged invention of the complainant, patented by her as aforesaid, was in public use and on sale with her consent and allowance more than two years prior to her application for said patent.

And these defendants, further answering on information and belief, deny that the said complainant was the original and first inventor of improvements in skirt protectors patented by her in and by her said patent. On the contrary, these defendants state, on information and belief, that prior to any invention thereof by the complainant the said alleged improvement and substantial and material parts thereof claimed as new were known to and publicly used by the following-named persons in this country, that is to say, by Thomas B. DeForest, at Birmingham and New Haven, Connecticut, who now resides at said Birmingham; by William H. Gallup, now residing in New York, at said city of New York, at the city of
9 Troy, New York; by Gustavus Sidenberg, at said city of New York, and who now resides at said last-named city; by Theodore B. Day, who now resides at Elizabeth, New Jersey, at said city of New York: by Lemuel W. Serrell, at said city of New York, who now resides at Plainfield, New Jersey; by Theodore Stockmar, at said city of New York, who now resides in said last-named city; by John C. Calhoun and Aaron S. Robbins, of the firm of Calhoun, Robbins & Co., of No. 410 Broadway, New York, and by said firm at said city of New York, all of whom reside in said last-named city except said Robbins, who resides in the city of Brooklyn, New York; by T. M. Spelman and William C. Spelman, of the firm of Spelman Brothers, No. 369 Broadway, New York, at said city of New York, and each of whom now resides in said city of Brooklyn, New York; by George S. Cook and John W. Valentine, of the firm of Cook, Valentine & Co., 39 Walker street, New York, and by said last-named firm at said city of New York, and all of whom now reside in said city of New York except said Valentine, who resides in said city of Brooklyn; by William H. Lyon, at said city of New York, and who now resides in said last-named city, and by the firm of Wm. H. Lyon & Co., of No. 483 Broadway, New York, at said city of New York, and whose present place of business is at said last-mentioned number; by Erastus T. Tefft, William E. Tefft, and James C. Griswold, of the firm of Tefft, Griswold & Co., New York, at said city of New York, and each of whom now resides in said city; by R. H. Macy, of the firm of R. H. Macy & Co., No. 204 Sixth avenue, New York, and by said firm, at said city of New York, and each of whom now resides in said last-named city. *[And also by James Morrison, of

* Words in brackets inserted by amendment, filed by consent June 16, 1879.

Elizabeth, State of New Jersey, at said city of New York; Daniel O'Donnell, Henry Douglas, George Garrett, Rebecca Hood, and Annie Ornton, all of said city of New York, at said city; Carrie E. King, Louise J. Ringland, Jane M. Kittredge, Annie E. Mellus, James G. Bowden, William Clapp, John Harrington, Mary E. Hazlewood, Charles Francis, Nancy H. Trafton, all of and at Boston, State of Massachusetts; John H. Kose, of and at Newark, State of New Jersey.] And also that prior to the date of said alleged invention by the complainant, as these defendants are informed
10 and believe, the same and substantial and material parts thereof were shown and described in certain letters patent of the United States, granted to Thomas B. DeForest, bearing date January 15, 1867, and marked No. 61172; and in certain other letters patent of the United States, granted to James A. Mackee, dated January 10, 1865, No. 45840; and also in certain other letters patent of the United States, granted to Lucinda Humphrey, dated April 22, 1862, No. 35026; and also in certain other letters patent of the United States, granted to Theodore D. Day, for an improved dress protector, dated February 7, 1865, No. 46218.

And these defendants, further answering, deny, on information and belief, that said patent of the complainant granted or secured to her, or was intended to grant or secure to her, an exclusive right, or any right, to make, use, or sell skirt protectors, the same, or substantially the same, in construction and operation as the skirt protectors which have been sold by them, as aforesaid, since the date of her said patent, or like or similar to those which have been furnished to the defendants by said firm of G. Sidenberg & Co., and sold by them, as aforesaid, and they deny, on information and belief, that the complainant has suffered or sustained any damage from their aforesaid acts, and also that she is entitled to recover of them, or any or either of them, any gains or profits accruing to them, or any or either of them, therefrom.

And these defendants pray the same benefits and advantage from the facts and things, or any part thereof, which are herein set forth, as if, for the reason thereof, the said bill had been demurred to, where a demurrer would have been proper, and the same benefit and advantage thereof as if they had been specially pleaded to said bill.

And these defendants respectfully submit to this honorable court that said complainant has no right to any further answer to said bill, or to any part thereof, and no right to an injunction, account, or other relief prayed for in said bill; and these defendants pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

JOHN SHEPARD.
HENRY NORWELL.
ROBERT FERGUSON.

11 UNITED STATES OF AMERICA, } ss:
District of Massachusetts, }

On this 16th day of September, 1876, before me personally ap-

peared John Shepard, Henry Norwell, and Robert Ferguson, the defendants in the foregoing answer named, and who have signed the same, and who, having been by me severally duly sworn, depose and say, and each for himself says, that he has heard read the foregoing answer subscribed by them, and knows the contents thereof; that the same is true of his own knowledge except as to such matters as are therein stated on information and belief, and as to those matters he verily believes it to be true.

[SEAL.] JOHN G. STETSON,
U. S. Commissioner.

At the same term the following replication was filed:

Replication. [*Filed Nov.* 25, 1879.]

12 This repliant, saving and reserving all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication saith she will aver and prove this bill to be true, certain, and sufficient to be answered, and that defendants' answer is uncertain, untrue, and insufficient to be replied to, without this, that any other matter or thing whatever in said answer material or effectual in the law to be replied to, confessed and avoided, traversed or denied, is true. All which this repliant will aver and prove as by the court directed, and prays as in and by said bill she has already prayed.

By her solicitor:

BENJ. F. BUTLER,
Per McD.

13 This cause was thence continued from term to term to the October term, A. D. 1879, when the publication of the testimony was ordered and the cause was set down for hearing and fully heard on the eleventh day of March, A. D. 1880, before the honorable John Lowell, circuit judge.

This cause was thence continued from term to term to the October term, A. D. 1880, when, on the fifteenth day of October, the honorable John Lowell, circuit judge, sitting, the opinion of the court was announced and the following decree entered:

Decree.

This cause came on to be heard at the October term of this court, 1879, upon the pleadings and proofs, and was argued by counsel for the respective parties, and was thence continued under advisement from term to term to this present term, and now, upon consideration thereof, to wit, October 15, 1880, it is ordered, adjudged, and decreed as follows, viz: That the letters patent referred to in the complainant's bill, being letters patent of the United States
14 granted unto said Helen Marie Macdonald, No. 155,534, dated September 29, 1874, for a new and useful improvement in skirt protectors, as amended according to a disclaimer filed in the Patent Office Nov. 9, 1874, is a good and valid patent, and that the said Helen Marie Macdonald was the original and first inventor of

the improvement described and claimed therein, and that the said defendants have infringed the said patent and upon the exclusive rights of the complainant under the same. And it is further ordered, adjudged, and decreed that the complainant recover of the defendants the profits which they have received or made, or which have accrued to them from said infringement by the manufacture, use, or sale of the improvement described and secured by said letters patent at any and all times since the date thereof, and in addition thereto the damages which the complainant has sustained thereby.

15 And it is further ordered, adjudged, and decreed that it be referred to Thomas W. Clarke, a master of this court *pro hac vice*, to take and report to the court an account of the profits which the said defendants have received, or which have arisen or accrued to them, from the infringement of the patented invention by unlawfully making, using, or vending the same, as alleged in the bill, and to ascertain and report the damages, if any, in addition to the profits which the complainant has sustained thereby since the date thereof.

And it is further ordered, adjudged, and decreed that a perpetual injunction be issued against the defendants according to the prayer of the bill.

And it is further ordered, adjudged, and decreed that the complainant recover of the defendants her costs of suit.

This cause was thence continued to the May term of this court, A. D. 1881, when the following report of the master was filed:

16 [MEMORANDUM.—The master's report and exceptions thereto are contained in Vol. II of the record as made up for transmission to the Supreme Court of the United States.

JOHN G. STETSON, *Clerk.*]

On the fifteenth day of August the following exceptions to the master's report were filed. [See memorandum above.]

This cause was thence continued to the October term, A. D. 1881, when the following exceptions to the master's report were filed by consent. [See memorandum above.]

This cause was thence continued to this present term, when the same is set down for hearing and fully heard on the exceptions filed by both parties to the report of the master.

And now, to wit, May 29, A. D. 1882, it is ordered, adjudged, and decreed by the court that the exceptions of defendants to the master's report be sustained, that the complainant's exceptions thereto

17 be overruled, and that the said Helen M. Macdonald, complainant, recover against the said John Shepard, Henry Norwell, and Robert Ferguson, defendants, the sum of seventeen hundred and thirty-five dollars and seventy cents as and for profits and damages, as reported in Schedules A and B of the master's report, and her costs of suit, taxed at ——.

The defendants thereupon, in open court, claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their said appeal to effect and an-

swer all damages and costs if they fail to make their plea good, and said appeal is allowed.

Afterwards, on the twenty-second day of September, suggestion of the death of complainant is made by Edward C. Carrigan, her administrator, who appears and likewise claims an appeal, and
18 gives good and sufficient security that he will prosecute his said appeal to effect and answer all damages and costs if he shall fail to make his plea good, and said appeal is allowed.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

19 The following is the evidence upon which the cause was heard before the honorable John Lowell, circuit judge, on the eleventh day of March, A. D. 1880:

Evidence for Complainant taken before Isaac S. Morse, Justice of the Peace.

Deposition of Helen M. Macdonald.

BOSTON, MASS., *Aug.* 8, 1879.

In the Matter of HELEN M. MACDONALD, of said Boston, against John Shepard and others, for infringement of the patent of the said Helen M. Macdonald, No. 155,534, suit pending in the United States circuit court, in Massachusetts.

The deposition of the plaintiff, to be used in said case, taken before Isaac S. Morse, a justice of the peace, Edward N. Dickerson, of New York, appearing for the defendants, and the plaintiff appearing *pro se,* and she is sworn by me and testifies as follows:

I have frequently visited the store of the defendants in this case, in Boston aforesaid, since the issue of my patent and before bringing this bill, and have seen on their counters large numbers of skirt protectors like complainant's exhibit marked *a,* in this case (to be herewith returned), and I have frequently seen the clerks of said defendants, at said store, sell to customers goods like said exhibit. Besides notifying them by my counsel, General Butler, that they were infringing upon my patent, I have, on one or two occasions, spoken with their salesmen about the goods and their unlawful acts in selling them, whereupon I received impertinent answers, and, among other things, one of the salesmen said, in substance, that the firm was protected by the written bond or guarantee, given by the manufacturer of these goods, G. Sidenburg & Co., of New York, and that they would continue to sell them in spite of all that I could do to prevent them. This Exhibit A, "Day's Protector," is a very unsubstantial, poor article of manufacture; nothing could be made in this line of goods poor enough to be inferior to this article. Its inferior qualities have nearly ruined the market for such articles. Ladies who have used them say it does not pay to sew them in the dress; that they had bought and used two or three, and would
20 never use any more. I think there are many retail dealers in this city who will say they have heard such remarks. I

have used them myself, for the sake of experiment, and found that the best of them when worn in a dress would not last three days. The wide strip or body part of this protector is made of coarse cotton fabric, very thick and clumsy. It is coated with a composition consisting of burnt linseed oil, clay, etc., which renders it water-proof, but it contains no India-rubber whatever; consequently when worn in cold weather it stiffens up and cracks in pieces. The edge or fluted part is made of a composition containing India-rubber, but it is sewed on so slightly and unsubstantially that it comes off at once. It is simply sewed on with a very fine thread and long stitches, making the seam so weak that it does not hold. Indeed, pieces of the corrugated edge of the "Dress Protector" are frequently seen on our sidewalks. I met with one not long since on School street, in front of the Parker House. Soon after I saw another on the sidewalk, in front of the retail store of Jordan, Marsh & Co., of this city. I suppose some female, maddened by seeing pieces hanging to her dress, had torn it entirely off, and abandoned it to the mud and filth of the street.

The only thing to be wondered at is that some poor unfortunate female has not stumbled and broken her neck by getting her feet entangled in the edge of Mr. Day's "Protector." Complainant exhibits letters patent No. 155,534, marked by me "Exhibit B." She also offers letters patent to Theodore D. Day, dated March 23, 1875, marked "C," which were offered without objection.

HELEN M. MACDONALD.

[Counsel for defence calls upon the complainant to produce any evidence she may intend to rely upon tending to show that the skirt protector "Exhibit A" is substantially the same thing which is described and claimed in letters patent No. 155,534, and gives notice that after the *prima facie* case is closed he will object to the introduction of any evidence tending to show infringement.

Counsel for defendants waives the right to cross-examine the witness.]

[Complainant rests her case here.]

21 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

AUGUST 8, 1879.

The foregoing deposition was taken at the request of Helen M. Macdonald, of said Boston, to be used in a case pending in the circuit court of the United States in said Massachusetts, in which suit the said Helen is plaintiff, and John Shepard and others are defendants. The defendants were represented by their counsel, Edward N. Dickerson, Esq. The said deposition was written by me, the said deponent being first duly sworn according to law, and after being reduced to writing it was carefully read over to the said Helen, and signed by her in my presence.

ISAAC S. MORSE,
Justice of the Peace.

EXHIBIT B.—I. S. M., *Justice of the Peace.*

Letters Patent of the United States No. 155,534.

Granted HELEN MARIE MACDONALD, September 29, 1874; application filed May 10, 1873.

Improvement in Dress Protectors.

Specification.

To all whom it may concern:

Be it known that I, Helen M. Macdonald, of Lowell, Massachusetts, have invented a new and useful improvement in dress protectors, of which the following is a full and clear description, reference being had to the accompanying drawing forming a part of this specification.

My invention relates to protectors for the lower edge of dresses and other garments, and consists of a band or strip of fluted
22 or plaited fabric, either water-proof itself or covered or bound with any water-proof material.

In the drawing, Fig. 1 represents a view of a detached portion of the dress protector, and Fig. 2 represents the protector as applied to the bottom of a dress skirt.

A is the plaited or fluted band, which is water-proofed or bound with water-proof material, and *a* is a heading to which it may be secured for better attachment to the garment.

Heretofore skirt protectors have been made of a plaited or fluted strip of "wiggan" or other fabric stiffened with starch, which, upon becoming wet, gets limp, loses its shape, and absorbs the dirt, besides being objectionable on account of the harsh scraping noise it makes upon the pavement.

By my improvement these objections are overcome. The water-proof protector preserves the lower edge of the dress from all moisture on the ground, retains its rigidity and proper shape, giving a graceful hang to the skirt, and can easily be cleaned.

Having thus described my invention, what I claim, and desire to secure by letters patent, is—

As a new article of manufacture, a skirt facing or protector, having a fluted or plaited border, bound with or composed of enameled cloth or other water-proof material, substantially as and for the purpose set forth.

HELEN MARIE MACDONALD.

Witnesses:
LAURIN MARTIN.
GEO. J. CARNEY.

THE UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the files of this office of a disclaimer, filed November 9, 1874, in matter of the

letters patent granted Helen Marie Macdonald, dated September 29, 1874, No. 155,534, for "improvement in dress protectors."

In testimony whereof I, Ellis Spear, Acting Commissioner of
23 Patents, have caused the seal of the Patent Office to be hereunto affixed this first day of November, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[L. S.] ELLIS SPEAR,
Acting Commissioner.

Disclaimer. [*Filed in Patent Office Nov.* 9, 1874.]

To the Commissioner of Patents:

Your petitioner, Helen Marie Macdonald, of Lowell, county of Middlesex and State of Massachusetts, represents that she is the patentee and owner of a certain improvement in dress protectors, for which letters patent of the United States were granted to her, of date Sept. 29, 1874, No. 155,534.

That she has reason to believe that through inadvertence, accident, or mistake the specification and claim of said letters patent are too broad, including that of which said patentee was not the first inventor. Your petitioner, therefor-, hereby enters her disclaimer to that part of the claim in said specification which is in the following words, to wit:

"As a new article of manufacture, a skirt facing," and thereby limiting said claim as follows: "As a new article of manufacture, a skirt protector, having a fluted or plaited border bound with or composed of enameled cloth or other water-proof material, substantially as and for the purpose set forth."

HELEN MARIE MACDONALD.

Witness:
GEORGE E. BELTON.

Boston, Nov. 4, 1874.

24 EXHIBIT C.—I. S. M., *Justice of the Peace.*

Letters Patent of the United States No. 161,012.

Granted Theodore D. Day, assignor to Sallie V. Day, March 23, 1875; application filed February 4, 1875.

Improvement in Skirt Protectors.

Specification.

To all whom it may concern:

Be it known that I, Theodore D. Day, of Elizabeth, in the county of Union and State of New Jersey, have invented an improvement in skirt protectors, of which the following is a specification:

India-rubber has been employed as a skirt protector, either in the form of a plain strip of rubber fabric or of a folded or plaited strip.

The India-rubber surface is liable to wear off rapidly by abrasion against the floor or pavement.

The object of this invention is to provide a wearing surface of India-rubber sufficiently thick to be durable, and at the same time to prevent the rubber being so rigid as to interfere with the graceful falling and trailing of the dress, and also to allow the rubber to be applied easily by sewing to the bottom of the dress as a protector or facing to the inside thereof.

I use a strip of India-rubber that is made with longitudinal ribs, of sufficient size to withstand the wear to which it is subjected, and between these ribs there is a groove that makes the strip light and flexible, and the web of rubber between the ribs receives a line of stitching, by which the protector strip is united to a strip of rubber cloth, muslin, or other suitable material that is to be attached to the inside of the dress at or near the lower edge.

In the drawing, Fig. 1 is a cross-section of the strip of rubber, and a band of muslin or other material to which it is attached. Fig. 2 is a section of the same as attached to a dress skirt, and Fig. 3 is an elevation of a piece of such skirt protector.

The India-rubber strip is made with the two longitudinal ribs, *a b*, with an intervening groove, *c;* and this strip is very light and pliable, because the two ribs become similar to India-rubber cords, and the rubber at the bottom of the groove becomes a web that connects them. The India-rubber strip is attached to the strip *e*, of enameled cloth, rubber cloth, muslin, or similar material, by a line of stitches applied in the web at the bottom of the groove *c*.

By this construction the line of stitching is protected from wear by ribs *a b* of rubber, so that there is no risk of the rubber strip becoming detached, and the rubber ribs will last much longer than the materials heretofore employed, and at the same time the skirt protector can be wiped off easily to remove any mud or other foreign material.

The rubber strip may be continuous, or in suitable lengths or pieces, applied at the bottom of the dress, and is far superior to the braid or cord heretofore employed.

I do not claim a plain strip of India-rubber attached as a binding around the lower edge of a skirt lining or protector; neither do I claim a rib or cord inserted into the fabric of the lining, as these have been employed, and are different from and do not affect the object of my improvement.

I claim as my invention—

A skirt protector formed of a strip of India-rubber, having a thin portion or web, through which the rubber is stitched to a strip of muslin or similar material, and a rib that projects from the surface of the rubber sufficiently to protect the line of stitches from wear, substantially as specified.

Signed by me, this third day of January, 1875.

THEO. D. DAY.

Witnesses:

GEO. E. PINCKNEY.

GEO. D. WALKER.

26 *Evidence for Defendants taken Pursuant to the Sixty-seventh Rule of the Supreme Court of the United States, in Equity, as amended, before me, John A. Shields, U. S. Commissioner, Examiner.*

NEW YORK, *Sept.* 17, 1879.

Present: Miss Helen M. Macdonald, complainant; Edward N. Dickerson, Esq., of counsel for defendants:

Deposition of James Morrison.

Direct examination by EDWARD N. DICKERSON, Esq., of counsel for defendants.

Int. 1. What is your name, age, residence, and occupation?

Ans. James Morrison; age, forty-one years; residence, Elizabeth, New Jersey; occupation, manufacturer of dress trimmings, at 27 Green street, New York city.

Int. 2. State when you first were connected in business in New York, and with what firm.

Ans. In 1854. Firm of W. & J. Morrison.

Int. 3. What was their business, and where was their place of business?

Ans. They were jobbers and retailers of dress trimmings and small wares, at No. 9 Maiden Lane.

Int. 4. Who composed that firm, and what relation, if any, were its members to you?

Ans. William and James Morrison—William Morrison, my grandfather, James Morrison, my father.

27 Int. 5. How long did that firm continue at Maiden Lane?

Ans. I don't remember whether they moved in 1856 or 1857.

Int. 6. To what place did the firm remove its business from Maiden Lane?

Ans. No. 79 Chambers street.

Int. 7. When did your grandfather die?

Ans. He died in February, 1860.

Int. 8. Did he continue in the business after the removal to Chambers street?

Ans. He continued in the business until his death.

Int. 9. Have you any knowledge of the sale by that firm of rolls of enameled cloth in strips as an article of merchandise to be used in protecting the lower parts of ladies' dresses from the pavement? And, if so, state what knowledge you have, and describe the article, and where it was sold, and how extensively.

[Objected to as irrelevant and incompetent, and as having no bearing whatever on this case, the matter of enameled cloth facings having been passed upon by the Hon. George F. Shepley, judge of the United States circuit court, district of Massachusetts, in his decision of the case of Macdonald *v.* Blackmer and others, given in Boston, April 4, 1877.]

Ans. We did sell strips of enameled cloth put up in rolls, which

we cut from the wide piece ourselves. They were cut by my grandfather; we called them enameled skirt facings or enameled skirt protectors, and sold them as such in Chambers street. They were used for facing the bottom of ladies' dresses when they come in contact with the pavement. The article was enameled cloth, the same as used by carriage makers and upholsterers, cut in strips of about four and a half inches. I should say, at least, we sold over a thousand pieces.

Int. 10. How long a time did you manufacture and sell those rolls?

[Objection repeated, the matter of enameled cloth facings having been passed upon and decided by Judge Shepley, of circuit court of Massachusetts.]

Ans. We sold them both before and after my grandfather's death—for over a year before he died, and during the year afterwards.

28 Int. 11. Can you produce a specimen similar to those you manufactured and sold?

Ans. I can, and do produce it.

[Specimen offered in evidence, and marked "Morrison Skirt Protector, 1859."]

Int. 12. Did you know of those enameled cloth strips being used for the purpose for which they were sold in those years?

[Objected to as incompetent, irrelevant, and as having no bearing whatever upon this case.]

Ans. Have seen them worn.

Cross-examination by Miss HELEN M. MACDONALD:

Cross-int. 13. This "Skirt Protector of Morrison," as I understand, is a sample of skirt protectors sold by your firm in 1859, and later. Were they always cut in a straight strip, as this appears?

Ans. I didn't say that was a sample sold. I said a sample similar. A wide piece of goods was cut in strips. They might vary a little in width.

Cross-int. 14. The question was, were your skirt facings of those years always cut in straight strips like this sample "Morrison"?

Ans. They were always cut in the way previously described.

Cross-int. 15. Were your customers of those years people who lived in the vicinity of Maiden Lane?

Ans. No; we were doing business in Chambers street at that time.

Cross-int. 16. Well, did your customers live in the vicinity of Chambers street?

Ans. In Chambers street we only jobbed goods, and, as such, sold both city and country trade.

Cross-int. 17. Do you mean by that that you sold goods by wholesale only, and had no retail department?

Ans. We gave up the retail trade when we changed the location.

Cross-int. 18. What change of location do you allude to, and at what time made?

Ans. From Maiden Lane to Chambers street; between 1856 and 1857, I can't say exactly.

29 Cross-int. 19. Then you never sold goods like this "Morrison Skirt Facing, 1859," at retail, have you?

Ans. I cannot answer that, for this reason: Having a great many old customers, after we gave up the retail trade, we sold them such goods as we could from the stock, and may have sold them skirt protectors.

Cross-int. 20. Do you remember any one particular instance where you have sold skirt facings like this exhibit to retail customers?

Ans. No particular instance.

Cross-int. 21. Then you have always, as a wholesale dealer, sold these facings in pieces of about twelve yards in length, have you?

Ans. It was our rule to sell those pieces in twelve-yard lengths.

Cross-int. 22. Can you state how many yards were bought by a customer in those days for one dress?

Ans. No.

Cross-int. 23. Can you state how this facing was applied to a dress?

Ans. It was sewed on the under part of the skirt.

Cross-int. 24. Did it extend clear around the skirt?

Ans. Not as a rule.

Cross-int. 25. How wide were the skirts made in those days?

Ans. Ordinarily from four and a half to five yards.

Cross-int. 26. Was this enameled facing sewed to the dress at top and bottom or at the top only?

Ans. It was sewed both ways; there was no particular rule for it.

Cross-int. 27. Have you seen dresses having this facing sewed on both top and bottom?

Ans. I can't remember a particular case, but parties buying these goods would ask how they should be used, and we would have to explain the manner in which they were to be worn.

[Answer objected to as not responsive to the question.]

Cross-int. 28. [Question repeated.]

Ans. I have already answered that question to the best of my knowledge.

30 Cross-int. 29. You have not answered the question at all. Will you please to answer it, or decline to answer it?

Ans. I repeat my same answer as before; I have no other answer. I do not decline to answer anything. As a salesman, I called the attention of buyers to these goods, told them for what purpose we were selling them, and how they were to be worn.

Cross-int. 30. In answer to the 26th cross-interrogatory you have said "it was sewed both ways." Now, my question is simply this: Did you ever see a dress on which this facing was sewed on both top and bottom?

Ans. I have no further answer to make to that question than the one I have already made; I can't make any more.

Cross-int. 31. In answer to cross-interrogatory 27 you have said "parties buying these goods would ask how they should be used, and we would have to explain the manner in which they would have to be worn." How did you explain to those parties how the goods were to be worn?

Ans. Told them to sew them on to the bottom of the skirt.

Cross-int. 32. Did you tell them to attach them to the skirt top and bottom?

WITNESS: Do you want positive information on this point?

Cross-int. 33. I want to know what you told your customers when you explained to them the manner in which these skirt facings were to be worn?

Ans. We told them to sew them on, as I have already answered; cannot repeat what was said so long ago; can't remember in words what was said twenty years ago.

Cross-int. 34. Did you tell them to attach them to the top and bottom of the dress, or at the top only?

Ans. Have already answered this question to the best of my knowledge.

Cross-int. 35. Do you mean that you cannot remember what you said to them at that time, as you have said in your answer to the 33d cross-interrogatory?

Ans. I cannot remember the exact words.

Cross-int. 36. You were not asked to state the exact words. The question was, how did you explain to your customers that this
31 skirt facing should be worn, as you have said in answer to the 29th interrogatory that you had to explain to your customers how they were to be worn; I want to know what explanation you gave to them.

Ans. I have already answered this question, and decline to answer any further.

Cross-int. 37. How were these goods marked or labeled for sale?

Ans. Plain paper band around the roll; there was no printing.

Cross-int. 38. How did you bill them to your customers?

Ans. As enameled skirt facing, or skirt protector.

Cross-int. 39. Did you ever see one of those enameled facings worn on a dress?

Ans. I have.

Cross-int. 40. Were the facings on those that you have seen attached on both top and bottom?

Ans. I have already answered that question; I don't know whether the dresses I saw had the facings attached in that manner.

Cross-int. 41. Do you mean that you don't know whether they were attached to the top and bottom, or at the top only?

Ans. I mean that I cannot say positively that the dress or dresses that I saw had the facing only sewed at the top or at both the top and bottom.

JAMES MORRISON.

Attest: JOHN A. SHIELDS,
U. S. Commissioner.

Deposition of Henry Douglas.

Direct examination *of* EDWARD N. DICKERSON, Esq., of counsel for defendants:

NEW YORK, *Sept.* 17, 1879.

Int. 1. What is your name, age, residence, and occupation?

Ans. Henry Douglas; age, sixty-seven years; residence, 228 East Nineteenth St., New York city; occupation, merchant, dealing in hosiery and fancy goods at 334 Bowery.

32 Int. 2. How long have you been engaged in business as a merchant, and how long have you occupied the store 334 Bowery?

Ans. Have been a merchant thirty-eight years; have occupied that store thirty-two years.

Int. 3. Have you purchased and sold, as an article of merchandise, strips of enameled cloth to be used for protecting the lower parts of ladies' dresses from wear? And, if so, when did you first begin to buy and sell those goods, from whom did you purchase them, and for how long have you continued to have them on sale in your store?

[Objected to as irrelevant and incompetent, and as having no bearing whatever on this case, the matter of enameled-cloth facing having been passed upon by the Hon. George F. Shepley, judge of the United States circuit court, district of Massachusetts, in his decision of the case of Macdonald *v.* Blackmer and others, given in Boston, April 4, 1876.]

Ans. I have purchased and sold such articles of merchandise. I first began to buy and sell these goods about eighteen years ago; at least as much as that. I purchased them from W. & J. Morrison, of Maiden Lane. I have had them on sale in my store ever since that time, and have some now.

Int. 4. Did you ever buy them from that firm when their store was in Chambers street?

Ans. Yes.

Int. 5. Were those goods all of one color or of different colors?

Ans. All of the various colors of dress goods.

Int. 6. Will you produce now a specimen of those goods which you have had in your possession and on sale in your store for some years?

[Objected to as irrelevant and incompetent.]

Ans. I produce a sample.

[Sample offered in evidence, and marked "Exhibit Douglas Skirt Protector, J. A. S., Ex'r."]

Int. 7. About how long have you had that particular piece in your store?

Ans. Not less than eight years.

33 Int. 8. In what shape were these done up as you bought them and sold them?

Ans. In rolls of about twelve yards in length.

Int. 9. Were they sold for any other purpose than protecting the lower parts of the skirts of ladies' dresses, so far as you know?

[Objected to as incompetent and irrelevant.]

Ans. They were not. All I ever bought them for was for that purpose, and I sold them for that purpose.

Cross-examination by Miss HELEN M. MACDONALD:

Cross-int. 10. You say you have been a merchant for thirty-eight years. Have you done a retail business all that time?

Ans. I have.

Cross-int. 11. Are your customers residents of the Bowery and vicinity?

Ans. They are, or were, pretty much all departed.

Cross-int. 12. You say you bought these goods from W. & J. Morrison, in strips twelve yards in length. How many yards did you usually sell to a customer for a dress facing?

Ans. From one and one-half to three yards.

Cross-int. 13. What were these goods called when in the market, and by what name were they billed to you?

Ans. Skirt protectors.

Cross-int. 14. Have you any of your old bills of this facing, so named, which you can produce?

Ans. I have not, to my knowledge.

Cross-int. 15. Have you any books in which this article is so named?

Ans. I think not.

Cross-int. 16. How is this article attached to the dress?

Ans. Around the bottom by sewing it on.

Cross-int. 17. Was it sewed top and bottom?

Ans. It was sewed firmly at the bottom, and, as a rule, merely stitched to the top, for the purpose of keeping it up. I saw a piece this morning sewed on in that manner.

34 Cross-int. 18. Did you ever see this article attached to a dress at the top only?

Ans. I can't answer positively.

HENRY DOUGLASS.

Attest: JOHN A. SHIELDS,
U. S. Commissioner.

Deposition of George Garrett.

Direct examination by EDWARD N. DICKERSON, Esq., of counsel for defendants:

NEW YORK, *Sept.* 18, 1879.

Int. 1. What is your name, age, residence and occupation?

Ans. George Garrett; age, sixty years; residence, No. 9 West 14th street; occupation, nothing at present, on account of ill-health.

Int. 2. Were you employed by the firm of W. & J. Morrison at any time; and if so, when and where?

Ans. I was, from 1863 to 1870. It changed, however, during that time, to James Morrison & Company. This was at 79 Chambers street, New York city.

Int. 3. Was William Morrison, the father, alive when you first went to the firm?

Ans. He was not; he died before that time. I knew him well.

Int. 4. In 1863, and afterwards, did that firm sell dress protectors? And, if so, describe the article.

Ans. They did, and that is the article—

[Witness here points to "Exhibit Morrison Skirt Protector, 1859," as the article referred to in his answer.]

[Witness continuing:] I do not say that particular piece is one, but it was like that. I cut up hundreds of yards myself.

Int. 5. In what sort of package or form were these protectors done up for sale?

[Objected to as immaterial and incompetent, and as assuming that this piece of enameled cloth, cut in this way, can be used as a skirt protector, whereas it is evident, from the article itself, that it could only be used as a facing or stiffener on the old-fashioned ungored or straight skirts, worn in those years.]

35 Ans. They were in rolls; cut the whole piece up and then rolled, whatever length it might be.

Int. 6. What is the name in the trade by which the material of these protectors was known at that time?

Ans. Enameled cloth; and I have heard it called glazed muslin.

Int. 7. Is it a water-proof material?

Ans. I think it is.

Int. 8. For what length of time did you continue selling these rolls of enameled cloth from the store of the Morrisons?

Ans. I think we had it from 1863, more or less, till 1870.

Int. 9. Were these strips in one color or different in colors?

Ans. In different colors.

Int. 10. For what purpose were they sold?

Ans. They were sold for the protection of ladies' dresses.

Int. 11. To be applied where to the dress?

Ans. At the bottom.

Cross-examination by Miss HELEN M. MACDONALD:

Cross-int. 12. In what capacity were you employed by the Morrisons?

Ans. As a salesman.

Cross-int. 13. Did you sell for them at wholesale?

Ans. Yes.

Cross-int. 14. Then you sold these strips of enameled cloth in rolls or by the piece, and not by the yard?

Ans. Just whatever the piece might measure, more or less—if it was one yard or if it was ten yards.

Cross-int. 15. Do you mean by this that you sold the whole piece or roll of this enameled cloth, or that you sold it by so many yards, to a retail customer?

Ans. Sometimes they came in for a short piece. The enameled cloth did not always run the same. Some would want more or less; if desirable colors they would take a long piece.

Cross-int. 16. Did you sell this article by the yard across the counter to retail customers?

A. No.

36 Cross-int. 17. By what name was this article known to the trade, and for what purpose used?

Ans. It was known as protection for dresses; it was used for the protection of the bottoms of ladies' dresses.

Cross-int. 18. Did you bill them by that name to your customers?

Ans. Yes.

Cross-int. 19. How were these articles attached to the skirt?

Ans. They were sewed on the bottom in short pieces—say from two to two and a half yards—just as it suited the wearer.

Cross-int. 20. Were they attached to the skirts by sewing at the top and bottom, or at the top only?

Ans. I think they were at the top only.

Cross-int. 21. Do you know how wide around the bottom the skirts of dresses were made in those days?

Ans. Five or six yards.

Cross-int. 22. Did you ever see one of those facings sewed to a skirt by the upper edge only?

Ans. I have seen them on, but I couldn't tell.

Cross-int. 23. [Question repeated.]

Ans. I cannot say; I have seen them on, but I never noticed how they were sewed.

Cross-int. 24. Did you ever see a skirt with this facing sewed on top and bottom?

Ans. I never did, to my knowledge.

Cross-int. 25. Did you ever see a skirt having this facing hanging loose at the lower edge?

Ans. I think I have.

Cross-int. 26. When and where did you see this article so applied?

Ans. I have seen it in the street.

Cross-int. 27. How long ago?

Ans. Over fifteen years ago.

Cross-int. 28. Are you sure that you saw a dress more than fifteen years ago having this facing hanging loose at the lower edge?

Ans. I don't say I am sure I have seen it on the dress. I didn't say so before. I said I thought so.

GEORGE GARRETT.

Attest: JOHN A. SHIELDS,
U. S. Commissioner.

37 *Deposition of Theodore D. Day.*

Direct examination by EDWARD N. DICKERSON, Esq., of counsel for defendants:

NEW YORK, *Sept.* 18, 1879.

Int. 1. What is your name, age, residence, and occupation?

Ans. Theodore D. Day; age, forty-seven years; residence, Elizabeth, New Jersey; occupation, I represent my wife's interest with the firm of G. Siderberg & Company, who manufacture goods under patents which she owns.

Int. 2. Are you the inventor and patentee named in letters patent No. 161,012 for improvement in skirt protectors, dated March 23, 1875?

Ans. I am.

Int. 3. How long have you been connected with the manufacture or sale of articles used for the protection of skirts from the pavement, or of articles connected with ladies' skirts?

[Objected to as immaterial and incompetent, and as having no bearing upon this case.]

Ans. Since 1865.

Int. 4. In what capacity or way were you so connected in 1865?

Ans. As a member of the firm of Day & Horton, 19 Park Place and 16 Murray street, New York city, as manufacturers of hoop-skirts from 1861; as an inventor of dress facing and manufacturer thereof from 1865.

Int. 5. What was your business in the firm you have mentioned?

Ans. Directing the styles to be manufactured and selling of the goods to the trade generally.

Int. 6. In 1865 were you familiar with the manner in which skirts of dresses were protected from the pavement and the material that was used for that purpose?

Ans. I was.

Int. 7. State what material was used and how it was used at that time in New York.

38 Ans. As to material, "wiggan," grass cloth, hair cloth, enameled cloth facing or protectors, whatever they may be termed, were applied to the bottom of the dress—lower portion of the skirt of a lady's dress. Enameled cloth was in very general use, for the reason, as was stated by those who sold it, it had many advantages over the other fabrics, one particular advantage being that, when soiled, it could be cleansed by a dampened sponge or cloth. It, however, had its disadvantages; it was very noisy—decidedly objectionable to many on that account. Another objection, it would rapidly fray at the raw edge.

Int. 8. Have you here any sample of the enameled cloth protectors such as were then used?

Ans. I have.

[Witness produces and refers to "Morrison Skirt Protector, 1859."]

Int. 9. Were these a common article of merchandise at that time in New York?

[Objected to as immaterial and incompetent, and for assuming that this piece of enameled cloth is or ever was a skirt protector, or could be used as a skirt protector, when in reality it is only a straight piece of enameled cloth, and was used only as a stiffener or facing for the old-fashioned ungored or straight skirts worn previous to 1866, and as the matter of skirt facings of this description have already been passed upon by the Hon. George F. Shepley, judge of the circuit court for the district of Massachusetts.]

Ans. They were.

Int. 10. For how many years, to your knowledge, have these enameled-cloth protectors like "Exhibit Morrison Skirt Protector" been on the market as articles of merchandise?

[Objections repeated.]

Ans. For over twenty years.

Int. 11. Do you know how they were used by the purchasers of them in dresses as early as 1865 in the city of New York?

Ans. I do.

Int. 12. Describe the mode or modes of their use that you know of.

Ans. I have seen them attached to dresses when worn by
39 ladies walking upon the public streets; sometimes firmly attached—that is, I mean, were evidently fastened at both upper and lower edges of the protector. I have seen them when they were fastened only to one edge, and that edge the upper edge. I knew that it was fastened at the upper edge only from the convincing fact that a considerable portion of the protector could be distinctly seen showing its white back, as the protectors were then made. When the protector was fastened at both upper and lower edge the face or enameled side of cloth could only be seen. I, being a manufacturer of hoop-skirts and other wearing apparel adapted to ladies' use, was naturally a very close observer of such general goods; and, after having seen one or two dresses which contained enameled cloth of that present time, a blind man could generally tell by the rattling noise made on the pavement when such a piece of goods was passing by in a lady's dress as a protector.

Int. 13. Do you understand the skirt protector made of enameled cloth and shown and described in the Macdonald patent No. 155,534 now shown you?

[Objected to as incompetent.]

Ans. I do.

Int. 14. If that were made of enameled cloth, and were attached to a skirt in the manner shown in Fig. 2 of the Macdonald patent, would the enameled edge project below the skirt and show its white or unglazed side, as you have described in your last answer, with its raw edge on the pavement?

[Objected to, because it is incompetent for this witness to put a

judicial construction upon the Macdonald patent, and because the unglazed side of the enameled cloth made in exhibits for the Patent Office, and of all the exhibits sent to the Patent Office and used in this case previous to 1873—the unglazed side of the enameled cloth was never allowed to show beneath the edge of the skirt.]

Ans. It would.

Int. 15. In dragging along the pavement would that fluted enameled cloth make any less noise than a plain one?

[Objected to as incompetent.]

Ans. I do not see as to how there would be any perceptible
40 difference as to the question asked. I have never tested the matter. I think the difference regarding noise would be immaterial.

Int. 16. What would be the effect upon the raw edges of the flutings which came in contact with the pavement, if made of enameled cloth like Fig. 1 of the patent?

[Objected to as incompetent.]

Ans. The edge would rapidly fray out, and become very unsightly.

Int. 17. Now compare Fig. 1 of the patent with the skirt protector shown in the DeForest patent, No 61172, and with the improvement thereon, shown in the Day patent, No. 161,012, and with the "Skirt Protector Morrison, 1859," and point out the differences and the effect of the differences.

[Objected to as incompetent and irrelevant, and for assuming that any skirt protector is shown in the DeForest patent for "improvement in bindings for the skirts of ladies' dresses;" whereas, that patent only shows a binding which is intended to extend all the way around the skirt, and which the patent says is "enlarged." Further objection for assuming that this strip of enameled cloth, marked "Morrison," is anything more than it appears to be, to wit, a straight piece of enameled cloth used as a facing or stiffener for the old-fashioned straight or ungored skirts which were worn previous to 1866, and because, if the witness is offered as an expert in patents, he should have been shown competent first.]

Ans. The exhibit marked "Morrison Skirt Protector, 1859," is a plain piece or a strip of enameled cloth, which has been used in such width as such exhibit, and in various lengths, at the lower edge of the back of a lady's skirt for very many years. The object of placing that in such position in the dress was to take the wear, soil, and moisture that would naturally fall or adhere to that portion of the dress when in wear; its principal feature of recommendation being so easy to cleanse when soiled. Fig. No. 1, in No. 61172, represents a piece of India-rubber, vulcanized on to some ordinary fabric for the purpose, from the well-known fact of India-rubber having such great qualities of durability, particularly when subjected to abrasion, is placed upon the edge of this ordinary fabric, that the fabric
41 may enjoy the durability of the rubber. When these two

fabrics are so united, the one manufactured article is intended to be placed at the lower edge of the back part of the skirt of the dress, that the dress may enjoy the durability of that rubber edge. The fabric to which this rubber edge is attached may or may not be coated with India-rubber. The Day patent, No. 161,012, represents a skirt protector, having for its base a piece of enameled cloth similar to the Morrison exhibit, to which is attached a rubber edge, corrugated or grooved. This corrugation renders the edge flexible, allows of the stitching by which it is attached to its base to be thoroughly protected from wear, preventing the edge of the base from raveling, and making one of the most durable together with inexpensive dress protectors I have ever seen. Fig. 1 of the Macdonald patent represents a plaited enameled cloth dress protector, sewed by a line of stitching at or near the centre of the plaits, bound at the top by some fabric; the object of this binding at the top edge and stitching through the centre is to hold the plaiting in position. Without that binding and stitching the plaits would not have sufficient strength to hold their own weight. If it were not so bound and stitched, and should you catch hold of one of these protectors by its end, it would to all intents and purposes correspond exactly with the Morrison exhibit, if the two were held up side by side. The advantage might be claimed for a fluted or a plaited protector over a plain piece of enameled cloth, such as the Morrison exhibit, is mostly confined to the simple fact that it is somewhat more pleasing to the eye, but as to actual use I am open to conviction that it is any more durable. Plain wiggan has been in use, we might say, as a skirt protector, and fluted wiggan, also, for the same use, for many years, as the Macdonald patent states, before the date of her invention. But, she says, as a new article of manufacture, she claims a skirt protector having a plaited or fluted border, bound with or composed of enameled cloth or other water-proof material. The claim and the drawing, as represented by Fig. 1, coincide. It is just what she has got patented, and I respect the patent.

[The complainant objects to all the witness's last answer after the words "Fig. No. 1, in No. 61172," which assume to state the contents and purposes of patents spoken of, and objects particularly to his statements in regard to the DeForest patent for "Improve-
42 ment in binding," because that patent has already been passed upon by the Hon. John Lowell, judge of the circuit court, district of Massachusetts, and because if the witness is offered as an expert he should have first been shown competent.]

Int. 18. Compare the manner in which the Macdonald protector and the Morrison protector perform their office with the manner in which the DeForest and Day protectors do it.

[Objection repeated, and further objection made to the introduction of the Day patent, which is nearly two years later than the Macdonald patent, and therefore has no bearing upon this case.]

Ans. The Morrison protector is a plain piece of enameled cloth; the Macdonald protector, Fig. No. 1, is simply the same enameled

cloth, having the same raw edge and differs in this respect it is plaited. As to its durability, in my judgment, the plain protector has many advantages. It is true both will keep the dress from moisture, etc. It is true that both will gather up the mud and dust, etc. It is also true that both can be wiped off with a wet sponge. It is also positively true, while that wet sponge would make the plain surface clear and clean, the plaits in Fig. No. 1 would hold it, and it would be impossible to get it out, as those plaits are simply lodging-places for dirt. Of course it is understood that the raw edge has no durability to speak of, certainly not more in one case than in the other. Fig. No. 1 of the DeForest patent and Fig. No. 4 of the DeForest patent both have rubber edges, representing great durability that of Fig. No. 1 protecting one side only, while in Fig. No. 4 the rubber is so applied that it protects the inner and outer edge. The protector of the Day patent, No. 161,012, is a protector having an India-rubber edge, having the durability and corresponding in its action with Fig. No. 1 of the DeForest patent, having this advantage the groove through which it is stitched to the base, and the fact that it can be sewed on to enameled cloth or oiled cloth; a rubber edge could not be vulcanized on to enameled cloth.

[Adjourned.]

43 SEPTEMBER 19, 1879.

[Complainant objects to all that part of the answer after "plain piece of enameled cloth," because the witness has falsely asserted that Fig. No. 1 of the Macdonald patent shows a protector having a raw edge, whereas no exhibit was ever sent to the Patent Office or made by the complainant of plain enameled cloth wherein the raw edge was allowed to drag, or the plain or unglazed back of the enameled cloth allowed to show.]

Int. 19. Look now at the piece of the complainant's exhibit in this case marked by Isaac S. Morse, and now marked in this case "Complainant's Exhibit Infringement," and say what is the material out of which it is made.

Ans. Enameled cloth finished at the edge with a strip of India-rubber to prevent the edge from raveling, and to give additional durability to the protector.

Int. 20. Wherein does that differ from "Morrison's Protector"?

Ans. The edge of the enameled cloth having the rubber strip attached is folded over, the upper edge being raw. If the rubber strip was torn off, nothing would be left but the strip of enameled cloth plain.

Int. 21. Suppose the strip of enameled cloth to be attached to the dress in the manner shown in the patent of J. A. Mackee, Jan. 10, 1855, No. 44840, now shown you, wherein would it differ from the manner of attaching it in which the raw edge was unprotected, as you have heretofore testified; and wherein also would it differ from the Day protector as exhibited by the complainant?

[Objected to as irrelevant and incompetent, and because the Mackee patent (a patent for a facing) has been passed upon, and decided

by Judge Shepley, of the circuit court for the district of Massachusetts, to be an entirely different article from the protector described in the Macdonald patent.]

Ans. The Mackee patent spoken of is composed in part of a strip of enameled cloth bound at the lower edge with what is known as "skirt braid;" the strip of enameled cloth being attached to an additional strip of textile fabric. The object of binding the Mackee protector with a skirt braid is to prevent the raw edge from
44 raveling, and is applied to a dress in a similar manner as the exhibits spoken of, and is intended to accomplish the same result—that is, to protect the bottom of the skirt of a dress; and the lack of durability on the part of this binding skirt braid called out the further improvement which is to be found in the patents of DeForest and Day.

[Defendants' counsel offers in evidence the letters patent, specification, and drawings of T. B. DeForest, January 15, 1867, No. 61172, also specification and drawings of letters patent to J. A. Mackee, January 10, 1865, No. 45840, marked respectively "Defendants' Exhibit DeForest Patent" and "Defendants' Exhibit Mackee Patent."]

[Both these exhibits objected to as having already been passed upon.]

[Defendants' counsel also offers in evidence specification and drawings of letters patent to Lucinda Humphrey, April 22, 1862, No. 35026, marked "Defendants' Exhibit Humphrey Patent;" also the file-wrapper and contents in the matter of the letters patent granted Helen Maria Macdonald, September 29, 1874, No. 155,534, marked "Defendants' Exhibit File-Wrapper Macdonald Patent."]

Int. 22. Will you produce specimens of the skirt protectors, such as "Complainant's Exhibit Infringement," as the same are applied to the skirts of dresses, and explain the same?

[Objected to as incompetent and irrelevant.]

Ans. I will, and do.

[Defendants' counsel offers in evidence two specimens produced by the witness, marked "Defendants' Skirt Protector applied."]

Ans. [Witness continues:] One of these exhibits represents the skirt of a dress hemmed at the lower edge, having attached to it a protector as made under the DeForest patent, also as a piece made under the Day patent. The other exhibit represents a section of a dress bound at the lower edge with ordinary skirt braid, with the DeForest and Day protector applied. The lower edge of the protector is placed to the lower edge of the dress, and is sewn at the top and bottom.

Int. 23. Which of these is according to the DeForest pat-
45 ent and which according to the Day patent? Designate them so that the court may see.

[Objected to as immaterial and incompetent.]

Ans. The ones having the corrugated rubber edge sewed to the enameled cloth are in accordance with the Day patent; those being all rubber are in accordance with the DeForest patent.

Int. 24. Is the manner of attaching them to the dress shown in these exhibits the usual manner of their use, so far as you know?

Ans. It is.

Int. 25. The complainant in this case, in her testimony at Boston, swore in substance that the dress protector of which "Complainant's Exhibit Infringement" is a piece was a very dangerous article to be attached to a lady's dress and was practically worthless as a dress protector. Have you a knowledge of the practical value of this protector and of the amount of it in use, and whether it is dangerous to be used for any reason? If so, state your knowledge on the subject, and whether you agree with the complainant's very discouraging opinion in respect to the usefulness and value of this invention.

Ans. The trade generally who buy and sell the Day protector time and time again have told me it was the only protector in the market that they could sell, and the only one they thought it worth while to put into a dress. I have had manufacturers of dress protectors say to me that the Day protector was the best protector in the market, and they had no doubt but that it would supersede every other, and would congratulate me upon the invention. As to its being dangerous in any way, I fail to see where the danger lies. One strong proof as to the virtue and selling qualities of the Day protector is the fact that several manufacturers have infringed the patent, one of which was litigated with and defeated in the circuit court of the United States for the southern district of New York, and paid damages for such infringement; and litigation is now going on with others. If it were not a good protector I would ask why these parties want to make it; and I was informed by the very best of authority that even Miss Macdonald herself urged a firm in Boston to make similar goods, under the plea that her patent
46 she thought would protect them; the sale at that time of the Day protector was very general in the city of Boston.

Int. 26. Have you other forms besides that exhibited by the complainant as an infringement in which the Day patent is manufactured and sold? If so, produce the specimen and explain the difference between it and the one produced by the complainant.

Ans. I have and do.

[Defendants' counsel offers in evidence the specimen produced, and the same is marked "Day Protector No. 2, J. A. S., Ex'r."]

Ans. [Witness continues:] In the Day Protector No. 2, the base is known as "wiggan." In the "Complainant's Exhibit Infringement" the base of the protector is enameled cloth; and with the single exception of width there is no difference.

Cross-examination by Miss HELEN M. MACDONALD:

Cross-int. 27. What is the difference between skirt facings, skirt bindings, and skirt protectors?

Ans. As a broad principle there is no difference.

Cross-int. 28. Is there, in your opinion, no difference between the "skirt braid" spoken of in your answer to the 21st interrogatory, and the piece of enameled cloth marked "Morrison Skirt Protector, 1859," and are they, as a matter of fact, used for the same purpose on a dress?

Ans. Broadly there is no difference, as both perform the same functions.

Cross-int. 29. Do you think this "Morrison Skirt Protector, 1859," would make a suitable "binding" for a dress of silk or satin?

Ans. I do.

Cross-int. 30. In answer to the 21st interrogatory you have said: "The Mackee patent spoken of is composed of a strip of enameled cloth, bound at the lower edge with what is known as skirt braid." Do you understand that article (the Mackee facing) to be bound singly, that is, separately from the dress material?

Ans. The Mackee goods are, as I said, bound with a "skirt braid," and may be applied to a dress, that is, of itself, without being bound with a skirt braid. In that case it becomes, in one sense of the word,
a binding; you might call it a combination binding; you
47 might call it a water-proof binding. Webster, in defining the word "binding," says: "A binding is anything that prevents the edge of cloth from raveling." If you choose, you could call it a "binding protector," or a "protector binding;" no matter what name you give it, it does not alter the article itself, nor its accomplishing the object for which it was made. It is clear to my mind that the Mackee facing, as he terms it in his patent, might, speaking correctly, more properly have been called a protector, from the fact that it is composed of water-proof material. In all the patents that I am familiar with and just now remember, the word "protector" is never made use of unless a water proof material is a component part. Lucinda Humphrey, in her patent of 1862, speaks of her "improvement in skirt protectors;" in fact, that is the name she gives it. She says, "I claim as my invention a skirt protector, made substantially as described, out of any water-proof material in combination with the lower portion of the petticoat." DeForest, in his patent, makes use of the word "protector," and uses India-rubber, which is the most water-proof material known to the skirt-protector trade.

[Answer objected to as being not responsive to the question, and for assuming to state the contents of dictionaries, and the contents of patents mentioned. Particular objection is made to the statement in regard to the Lucinda Humphrey patent, which shows from its specification and drawings that the said Lucinda Humphrey invented a sack or protection for hoop-skirts; said sack being composed of oiled silk, and as in no way connected with the bottom of a dress skirt.]

[Witness continues:] I desire to state further, in answer to the last inquiry, that, on reference to the "Defendants' Exhibit Humphrey Patent," she uses these words: "The object of this invention is to protect the bottom of the skirts and dress from being wet or

soiled by contact with the ground, when worn in wet weather, or when they may otherwise require such protection; and it consists of a strip of oiled silk or muslin or other similar material, of length sufficient to extend around the lower periphery of the skirt, and of sufficient width to double over the edge, and extend upwards on the inner and outer side to the necessary height for that purpose." She further says: "The wearer may tuck the bottom of her dress in a few minutes into the protector, and then proceed over wet or
48 muddy ground without soiling her dress, and without being compelled to carry it raised in her hands."

[The witness wishes to say that, if the above protector was not made to protect the dress, he thinks he doesn't understand plain English.

The complainant wishes to continue the quotation, and remarks that the witness has seen fit, for his own convenience, to stop at a placed suited for his benefit. "The oiled silk or other material used as a protector is secured to metal loops, which I prefer to make of steel, and which hook into the eyelets or are otherwise attached on the bottom of the petticoat. It may be worn under the dress, out of sight, on ordinary occasions, and, when desired, the wearer may tuck the bottom of her dress in a few minutes into the protector, and then proceed over wet or muddy ground without soiling her dress and without being compelled to carry it raised in her hands. To enable others skilled in the art to make and use this invention I will proceed to describe its construction and operation: Fig. 1 is a view of an ordinary hooped skirt with a skirt protector of my invention attached, and Fig. 2 represents the metal loops by which the protector is secured to the petticoat. The oiled silk *a a* extends around the lower periphery of this skirt, and is doubled up around the metal loops *d*, to which it is attached at the edges, to the points *c* and *d* of the loops. The edges of the protector are slightly gathered to make it set close. The metal loops have hooks at one of their points *c* that hook into eyelets on the band *e* of the petticoat. The inner edge of the protector may be sewn to the lower hoop of the petticoat."

Defendants' counsel objects to any further quotations from a patent already in evidence, and which speaks for itself.

The complainant replies that she has quoted enough to show the court that Lucinda Humphrey's patent, No. 35026, patented April 22, 1862, is for what she claims it to be, and no more—a sack to protect the bottoms of hooped petticoats, then universally worn.

The witness desires to say further that, in his opinion, the invention spoken of in the patent of Lucinda Humphrey is for, and only for, the protection of the skirt of the dress, no matter whether it be attached to the hoop-skirt worn by the wearer or to her stockings.]

49 Cross-int. 31. [Question repeated.]
Ans. I do.

Cross-int. 32. Has Mackee said in his patent that his combination facing is bound by braid separately from the material?

Ans. I don't know that he does. In my judgment, the drawing of the patent shows a binding at the edge.

Cross-int. 33. By what authority did you make the statement, in your answer to the 30th interrogatory, that the Mackee facing was bound with "skirt braid" separately from the dress material, since Mackee says plainly in his patent: "In applying the combination facing to a dress the lower edge of the water-proof band is to be sewed to the bottom edge of the dress, and is to be protected by a band of braid (*c*) stitched to the dress and the water-proof facing"?

Ans. My impressions are, when I saw the Mackee facing, which is some years ago, that it was bound on one of its edges. I should judge so from the drawing of the patent; and I am quite positive that Mr. Robert Ferguson, who was the agent for the sale of the Mackee protectors in the city of New York, told me so.

[Answer objected to as not responsive to the question and as hearsay.]

Cross-int. 34. Are you familiar with the manufacture of the article you spoke of in your answer to the 21st interrogatory as "skirt braid" or "binding"?

Ans. Yes.

Cross-int. 35. How wide is the ordinary braid or binding for skirts?

Ans. It varies from quarter of an inch to two or three inches.

Cross-int. 36. I speak of the "ordinary" skirt braid or binding, the one thing universally worn as a skirt binding; how wide does it usually come?

Ans. For ordinary use from half inch to an inch.

Cross-int. 37. Does it extend all around the skirt?

Ans. It does.

Cross-int. 38. What is a skirt facing?

Ans. A skirt facing, as very commonly understood, is a
50 fabric attached to the inner side of a skirt; but a facing is not confined to the inner side of a skirt by any means.

Cross-int. 39. Of what material or fabric is this facing generally made?

Ans. Of any textile non-water-proof material when applied to the inner portion of a skirt; of velvet, silk, etc., when applied to the outer portion of dresses.

Cross-int. 40. Did you ever see a dress having its facing upon the outside?

Ans. Very many.

Cross-int. 41. What finished the raw seams on the inside of the skirts, upon which you say you have seen the facings upon the outside?

Ans. Any fabric they chose to employ.

Cross-int. 42. What would you call such "fabric" after it was sewed into the skirt?

Ans. The object of covering the seam of a waist of a dress, as I supposed, was simply to give it additional strength. I have seen ordinary tapes used.

[Answer objected to as not responsive to the question.]

[Adjourned.]

[Counsel for defendants, in reply to a suggestion made by the complainant that she is not subject to the expense of printing the testimony now being taken, and, therefore, that she will continue cross-examination indefinitely, informs her that, by the rule in Massachusetts, the complainant must print the whole testimony on both sides, under the direction of the clerk, and at her own expense, before the case can be heard; and, therefore, she is proceeding upon an erroneous idea that she can subject the defendants to expense by prolonging the cross-examination.

The complainant objects to the above statement by defendants' counsel, and replies that she has not said that she would "continue the cross-examination indefinitely;" and she further informs defendants' counsel that if that statement was made with a view to prevent her from cross-examining the witness upon all the points at issue, it will not have the desired effect. And she hereby gives notice to the
51 defendants' counsel that as Shepard, Norwell & Company, of Boston, are protected by a bond given them by G. Sidenberg & Company, of New York, and that said Shepard, Norwell & Company disclaim all responsibility connected with this suit, and as this suit is actually defended by G. Sidenberg & Company, of New York, she will move before the circuit court of the United States for the district of Massachusetts, as soon as she can be heard, that the costs of the printing of this testimony be paid by these defendants.

Counsel for the defendants advises the complainant that he knows of no law to prevent her from making any motion she may choose.]

Cross-int. 43. [Question repeated.]

Ans. As I am not a dress-maker I am not familiar with all the technical names of the component parts of a dress.

Cross-int. 44. You have given us to understand in former answers, particularly in answers to interrogatories 10, 11, and 12, that you were familiar with all these articles. Now, my question is very simple: you have stated that you have seen very many dresses having their facings on the outside, what would you call the article that is placed around upon the inside to conceal the raw seams of a skirt, improve the hanging of it, etc.?

Ans. By various names, as follows, a lining, binding, protector; and I will say further, in explanation, a lining is a something placed inside of a dress or of a man's coat. A binding is a thing that prevents the edge of cloth from raveling. A protector is a thing giving protection to a weaker article to which it may be attached; as, for example, a piece of iron and a piece of wood may be fastened together, the wood being the weaker, and the iron the stronger; the iron protects the wood, and is, therefore, of necessity, a protector. Again, if a piece of enameled cloth or water-proof cloth were attached to the lower portion of a lady's dress, to interpose between it and the ground, it becomes, of necessity, a protector. I do not say that it cannot be called a facing; by many it is so called. The

fabric of the dress being now water-proof, and the fabric of the facing, if you like to call it so, being water-proof, it takes the wear, moisture, mud, etc., and shields the fabric of the dress; therefore it protects the dress, and is a protector. If you should scrape off the enameled surface of this facing, so called, it would lose its protecting quality; and, having lost that, I have no doubt it ought
52 to give up the name of protector. All of the various patents put in evidence in this case relate to a thing to be interposed between the bottom of a lady's dress and the pavement. These patents make special mention of making use of water-proof material; but their claims rest solely upon their novelty of construction, and are intended to shield that portion of the dress, at which they are attached, from mud, etc. One inventor speaks of his as being a facing; another as being a protector, and another as a binding; but it is the article made and not its name that is patented. I don't see how it alters the case, call it by whatever name you will.

[Complainant asks to have all of the last answer stricken from the record, because it is rambling and incoherent, and sounds more like the ravings of a madman than it does like the statement of a sane man, and because it is not responsive to the question.]

Cross-int. 45. Does the facing you have spoken of extend all around the dress?

Ans. Sometimes it does and others not.

Cross-int. 46. Does the braid or binding extend all around the skirt?

Ans. The braid binding does.

Cross-int. 47. Does the skirt protector go clear around the skirt, or only part of the way?

Ans. I have never seen a dress made with a protector extending all the way around.

Cross-int. 48. In answer to the 45th cross-interrogatory you have said that the facing sometimes extends all around the dress, and sometimes not. When it extends only part of the way, on which part is it put—on the back part, front part, or on one side?

Ans. On the back, or trailing portion, if the dress trails.

Cross-int. 49. In that case are the front and sides of the dress to be without a facing or anything else to cover the raw seams and make them more substantial?

Ans. They are faced with non-water-proof material, as a rule, all the way around; and where a water-proof material is employed as a protector or further facing, such water-proof material is placed, as a rule, only at the trailing portion of the dress. Sometimes
53 "wiggan" is used as an additional facing at the trailing portion of the dress; hair cloth and grass cloth also.

Cross-int. 50. You were not asked about water-proof material nor about wiggan, grass-cloth, or hair-cloth stiffening. The question was, when, as you have said, the facing extends only around the back portion of the dress, what conceals the raw seams and finishes the remaining portion of the inside of the dress?

Ans. A lining, as I understand the question.

Cross-int. 51. Does that lining extend clear to the top of the skirt?

Ans. As a rule, I think it does.

Cross-int. 52. Then do you say that the fronts of all skirts are lined while the back portion are without lining?

Ans. I do not.

Cross-int. 53. In the 25th interrogatory you were asked what knowledge you had of the practical value of the Day protector (a piece of which was introduced in evidence, marked "Complainant's Exhibit Infringement"), and whether it was dangerous to be used for any reason. How do you know that it is not dangerous?

Ans. I fail to see any reason why it is dangerous.

Cross-int. 54. Is there no danger to the lady wearing this Day protector ("Complainant's Exhibit Infringement") in getting her feet entangled in the corrugated edge of that protector?

Ans. None that I can see.

Cross-int. 55. Can you state why the sales of that protector have diminished of late?

Ans. One cause is evident—from the very general use of short skirts.

Cross-int. 56. Short skirts became fashionable in the spring of 1879, but the sales on the Day patent must have diminished greatly in 1877 and 1878. How do you account for that?

Ans. I have no information to base any calculations upon.

Cross-int. 57. I ask you to state, as a matter of fact, if the sales of the Day protector did not diminish greatly in 1877 and 1878.

Ans. The sales have diminished.

[Adjourned.]

54 SEPTEMBER 25, 1879.

[Witness continues:] Very many threatening letters bearing General Butler's name have been sent to different firms in New York and elsewhere, in which he says that any protector in which a water-proof material is employed is an infringement of Miss Macdonald's patent. Therefore many of these firms have declined to keep on sale everything and anything of the kind, and have said to the witness that protectors made under the Day patent are the only ones that they care to keep on sale, and, if the witness ever reaches the end of this litigation successfully, that they will take great pleasure in having his goods on sale.

Direct examination resumed:

Int. 58. Will you produce samples of the dress protectors about which you have testified and explain them?

Ans. I will and do.

[Defendants' counsel offers in evidence samples referred to, and the same are marked "Protector Samples, J. A. S., Ex'r."]

[Witness proceeds:] No. 1 represents a plain piece of enameled cloth on the one side, attached as a protector, as I have heretofore testified, like "Morrison Exhibit, 1859." On the other side of the same "swatch" are two specimens of the Macdonald protector; the

one composed of enameled cloth entirely, with the plaits stitched down and sewed fast to a heading. This is exactly the thing shown in Fig. 1 of the Macdonald patent; attached to it in black wiggan is a sample of the alternative form of protector suggested in the patent in which the plaited strip of wiggan is bound with a water-proof material. No drawing of this is shown in the patent, but I believe this to be a fair representation of the thing suggested.

No. 2 shows the "Morrison Protector, 1859," and the Macdonald protector of enameled cloth attached to a dress and bound in at the lower edge.

No. 3 shows the Morrison and Macdonald protectors attached to the dress, with the enameled side next the dress. The Macdonald patent does not state which side of the enameled cloth is to be out, and it might be applied either way. If applied as in No. 3 the color of the enamel might be made to match the dress, in which case the plaiting projecting below the skirt, as in Fig. 2 of the patent, would be ornamental before it was used and hung up in a window for exhibition. When used, however, whichever side was out, its ornamental quality would be destroyed very quickly by fraying the raw edge on the pavement, which difficulty it would have in common with the Morrison protector used in the same way.

No. 4 shows the same pair of protectors with the enameled surface inward. These would show the cloth face below the dress, whatever color it might be. The fraying would be, however, as destructive in that way of presentation as the other. This mode of attaching them, I should think, would be preferred to the other, because the enameled surface would be next to the ground; but, as I understand the patent, either way would be within it.

No. 5 represents the same pair of protectors, covered on the cloth side with another facing, which might be made to correspond with the dress in color and bound with a skirt braid which is not water-proof. If this method were used the braid, as is usual, would have to be worn off before the raw edge would be frayed, and it would become a sort of protector to the protector. Nothing of that kind, however, is suggested in the specification; but, as braids were in common use on the lower edges of dresses, I have put them on these samples as not requiring any invention to apply them to actual practice. If it does require any invention it is not described or claimed in the patent, and my use of it has been from my knowledge of the use of braid for similar purposes.

As I have heretofore said, the DeForest invention and my invention substitute wearing strips of India-rubber for a braid binding or no binding at all, whereby the raw-edge difficulty is remedied, and a large amount of enduring material brought into action where the necessity for it exists, while at the same time the water-proof quality of the Morrison protector is retained to protect the lower part of the dress from damage.

THEO. D. DAY.

Attest: JOHN A. SHIELDS,
U. S. Commissioner.

56 NEW YORK, *September* 29, 1879.

Met pursuant to notice from complainant.

Present: Helen M. Macdonald, for complainant; Geo. T. Curtis, Jr., for defendants.

Cross-examination of THEODORE D. DAY, resumed by Miss HELEN M. MACDONALD:

[The complainant asks to have all words after "the sales have diminished" contained in defendants' answer to 57th cross-interrogatory stricken from the records, because the witness has attempted to impose upon her by proceeding in her absence with immaterial and incompetent testimony, she having finished her cross-examination with the answer to the 57th cross-interrogatory down to and including the mentioned words, viz., "the sales have diminished."

The complainant objects to exhibit marked "Protector Samples," because they do not represent anything described in any patents in evidence in this case. No. 1, which he says represents "Morrison Exhibit, 1859," is undoubtedly a fair sample of the article described as sold by Morrison; but from the sample it is evident that it never could be used for anything but a facing for the old-fashioned straight skirt, and in that case was always bound in with a braid. As it is on this "swatch," it means nothing.

Defendants' counsel objects to the complainant introducing her testimony or argument at this stage of the case.

Complainant continues: She would further say that the specimens upon the other side of the same "swatch," marked Macdonald Protector, do not represent exhibits or anything ever made by her. Although her exhibits, which she forwarded to the Patent Office, were made of enameled cloth (for the want of a better material), yet the white foundation, or back of the enameled cloth, was not allowed to show beneath the dress, and the raw edge was not allowed to drag, as those shown on Exhibit "Protector Samples" would indicate.

57 Complainant states that it would occupy too much space to describe each of these "swatches" separately. She is at a loss to know where these "swatches" originated, but thinks from their appearance that they were made either at Blackwell's Island or Bloomingdale. They were not made, evidently, by the Misses Connolly, of New York.

Defendants' counsel requests the complainant to proceed with the cross-examination of the witness.]

Recross-int. 58½. Did you ever see a dress having an enameled cloth facing or an enameled cloth protector applied wrong side out, as the "swatch" No. 3 indicates?

Ans. I have.

Recross-int. 59. Was it a facing or a protector?

Ans. Both, if you choose to call it the one name only; that is, I mean a facing or protector, whichever term you choose. I would make the explanation afterwards. I will give it a name, and call it

a thing. Defendant can call it whatever name she pleases. The witness will correct the term defendant and say complainant.

Recross-int. 60. Will you please look at the piece of plaited enameled cloth on "swatch" No. 3, and state whether that is a skirt binding?

Ans. It's a thing.

Recross-int. 61. I admit that it is a very curious thing; but what was it made to represent?

Ans. The Macdonald Dress Protector, as shown by the drawings of her patent in 1874, in figures No. 1 and No. 2. Her patent shows by those drawings a raw edge, and is similar to No. 3.

[Complainant asks to have the last answer stricken from the record, because the witness has wilfully falsified the statement in regard to the Macdonald patent.]

The witness further desires to say that the complainant's counsel or the complainant is not under oath, but as evidence of the truth of the words spoken by the witness he respectfully refers to the Defendants' Exhibit File Wrapper, Contents, and Drawings, Macdonald Patent, as evidence of the truthfulness of his words.

Recross-int. 61½. I ask you again if the plain piece of enameled cloth on No. 1, "Protector Samples," can be used as a skirt binding?

58 Ans. It can.

Recross-int. 62. Can it be used as a skirt protector?

Ans. It can.

Recross-int. 63. Can it be used as a facing for a gored skirt?

Ans. It can.

Recross-int. 64. Then you swear that this skirt binding, skirt protector, and facing are one and the same thing, and answer the same purpose on a dress, do you?

Ans. I do.

Recross-int. 65. Does a skirt protector extend clear around the skirt generally?

Ans. Generally not.

Recross-int. 66. Does the skirt braid or binding extend clear around the skirt, or only part of the way?

Ans. Skirt-braid binding generally all the way round.

Recross-int. 67. Does a facing extend clear around, or only part of the way, and is it usually bound to the dress material with a braid or binding?

Ans. Sometimes all the way round; other times only in part; sometimes it is bound with a braid or binding, other times it is not.

Recross-int. 68. Have you read, and do you undertand, "Exhibit Mackee Patent," in this case?

Ans. I have, and think I do.

Recross-int. 69. In Fig. No. 2, in the drawing of that patent, do you understand the facing to be bound to the dress material with a skirt braid, *c*?

Ans. I understand, in the drawing No. 2, Fig. *c* to represent a skirt braid, not of necessity bound to the dress by this braid. If the

wearer should choose, she could bind the protector and apply it to the dress by one row of stitching at the top edge, flowing at the lower edge, below the edge of the skirt, if necessary, or sewing it firmly to the dress at the lower edge.

[Answer objected to as not responsive to the question.]

Recross-int. 70. Do you understand drawing No. 2 of the Mackee patent, that the dress material is attached to the facing with the skirt braid, *c*?

Ans. It may or may not be.

59 Recross-int. 71. I have not asked you to state what "may or may not be." I have asked you if the dress material shown in Fig. No. 2 of the Mackee patent is attached to the facing with skirt braid, *c*?

Ans. In Fig. 3 of the MacKee patent I should say it was.

Recross-int. 72. Is it in Fig. 2?

Ans. I see no dress material in Fig. 2.

Recross-int. 73. Do you see any letter which he says represents dress material?

Ans. Letter *c*, when the dress is bound in with the braid.

Recross-int. 74. Have you read the decision of Judge Shepley in the case of Macdonald *v.* Blackmer and others, given in Boston, April 4, 1876, in which he says that a skirt facing is an entirely different article from a skirt protector, and serves for a different purpose on the dress?

[Objected to as assuming to give the contents of Judge Shepley's opinion, and as irrelevant, immaterial, and incompetent.]

Ans. I have seen the decision of Judge Shepley; do not now remember the language he employs.

Recross-int. 75. But you contradict him by swearing, as you have done in answer to the 64th interrogatory, that a skirt facing and a skirt protector and skirt binding are one and the same thing; do you?

[Objected to as argumentative and assuming.]

Ans. I hardly know how to answer the question.

Recross-int. 76. Do you still swear, as you did in answer to the 64th cross-interrogatory, that they are one and the same thing, and serve for the same purpose, on a dress skirt?

Ans. I do.

Recross-int. 77. Did you ever see a facing, plaited or fluted, similar to the right-hand sample on "swatch" No. 2?

Ans. I have.

Recross-int. 78. Was it made of enameled cloth?

Ans. It was.

Recross-int. 79. Was it bound in with the braid?

Ans. It was.

Recross-int. 80. Did it extend clear around the skirt?

60 Ans. It did not.

Recross-int. 81. Did it extend below the edge of the skirt?
Ans. Not always.

THEO. D. DAY.

Attest: JOHN A. SHIELDS,
U. S. Commissioner.

Deposition of Robert Ferguson.

Direct examination by EDWARD N. DICKERSON, Esq., of counsel for defendants:

NEW YORK, *Sept.* 20, 1879.

Int. 1. What is your name, age, residence, and occupation?
Ans. Robert Ferguson; age, thirty-seven years; residence, 371 West 32d street, New York city; occupation, commission merchant at 51 Mercer street, New York city.
Int. 2. What was your occupation in the year 1865?
Ans. I was a clerk for Charles Francis.
Int. 3. What was the nature of the business?
Ans. I had charge of the New York store here; that was a branch of the Boston business.
Int. 4. What was the nature of this commission business?
Ans. Selling goods for different mills; different parties.
Int. 5. What was the general nature of the goods?
Ans. I would call it hosiery and notion business.
Int. 6. How long have you been acquainted with articles used for the protection of ladies' skirts from the pavements?

[Objected to as incompetent and immaterial, and because it does not appear that this witness is, or ever has been, acquainted with such articles.]

Ans. I think from about the year 1865 I sold Mackee's combination dress facing.
Int. 7. Have you sold such articles since the year 1865 continuously?

[Objected to as immaterial and incompetent, and because the patent for the article mentioned has been passed upon and
61 decided by the Hon. George F. Shepley, judge of the circuit court for the district of Massachusetts, to be a skirt facing, and an entirely different article from a skirt protector.]

Ans. No, sir.
Int. 8. To what extent have you sold the same during the years from 1865 down to the present time?
Ans. Mackee's skirt protector made such a noise that we discarded it, and sold another protector called the Ebenezer protector. Probably sold Mackee's for eighteen months. We carried Ebenezer till about a year ago in stock—very little sale, on account of short dresses coming into fashion.
Int. 9. Please look at "Defendants' Exhibit Mackee Patent," and

state whether you are acquainted with the invention therein described.

[Objected to as incompetent and immaterial, and because the Mackee patent for a facing has been decided by a judge of the United States circuit court to be a patent for a facing and not for a protector.]

Ans. That is the Mackee's combination dress facing that I have already said I sold.

Int. 10. Did you sell it under that name, and in about what quantity did you sell the same?

[Objected to as immaterial.]

Ans. Sold it in large quantities to the leading jobbing houses as Mackee's combination dress facing.

Int. 11. When this combination dress facing was sold to the leading jobbing houses as a dress facing, did it have attached to it at the lower edge any skirt braid; and, if so, in what manner was it attached to the said facing?

Ans. It did; it was stitched on to it; the braid was stitched on to it.

Int. 12. About what was the width of the braid?

Ans. About the width of an ordinary skirt braid; it had a cambric top.

Int. 13. Was it in the position shown at C in "Defendants' Exhibit Mackee Patent"?

Ans. Yes.

62 Cross-examination by Miss HELEN M. MACDONALD:

Cross-int. 14. Have you read the specification of this patent?

Ans. Part of it.

Cross-int. 15. Do you understand the particular use of this article as described in the patent?

Ans. Yes; it was used on the bottoms of dresses. That is what we sold it for.

Cross-int. 16. For what purpose was it used on the bottoms of dresses; for a facing, protector, binding, or what?

[Objected to as immaterial.]

Ans. It was used to keep the dress from getting soiled on the bottom.

Cross-int. 17. Was it bound to the dress with the skirt braid?

Ans. That was the intention that we sold it for.

Cross-int. 18. Did it extend all around the skirt?

Ans. It was a matter as how the person put it on. I don't know how they put it on; I should think the back part of the dress.

Cross-int. 19. Do you understand from the drawing of this patent that the skirt braid *c* binds the edge of the facing only, or that it binds the facing to the dress?

Ans. It does both; it binds the facing and the dress together.

Cross-int. 20. In answer to the 9th interrogatory you have spoken

of the Ebenezer facing or stiffening for the bottoms of dresses. Was this article water-proof?

Ans. No.

Cross-int. 21. Can you tell what quantity of the Mackee facing you were instrumental in placing upon the market?

Ans. I know that we sold an enormous quantity of it, but can't give dollars and cents or approximate it.

ROBERT FERGUSON.

Attest: JOHN A. SHIELDS,
U. S. Commissioner.

63 *Deposition of Lemuel W. Serrell.*

Direct examination by EDWARD N. DICKERSON, Esq., of counsel for defendants:

NEW YORK, *Sept.* 25, 1879.

Int. 1. What is your name, age, residence, and occupation?

Ans. Lemuel W. Serrell; age, fifty years; residence, Plainville, N. J.; occupation, solicitor of patents, doing business at 140 Nassau street, New York. I have been in the business of soliciting patents for over thirty years, and have been frequently called as an expert in patent cases arising in the United States courts.

Int. 2. Have you examined and do you understand the specification of the letters patent No. 155,534, granted to Helen M. Macdonald, for dress protectors, Sept. 29, 1874?

Ans. I have examined the said letters patent, and I do understand it.

Int. 3. What is the invention described in that specification as distinguished from what existed before?

Ans. I am familiar with the state of the art in relation to skirt protecting and binding devices, and I am well aware that before the invention of the complainant the lower edge of the skirt had been protected by various devices—such, for instance, as a strip of water-proof cloth, the same being rendered water-proof either by enameling or a thin layer of India-rubber. This strip was applied to the inner surface of the dress, near the bottom edge, so as to relieve the dress from wear and from being soiled by contact with the pavement. The left-hand portion of No. 1, on "Protector Samples," illustrates this character of protector. In some instances the lower edge of that protector corresponded with the lower edge of the dress, and in other instances it projected more or less below the lower edge of the dress, as illustrated by the left-hand samples 3 and 4 of said "Protector Samples." In some instances the lower edge of a dress was protected by a binding, and that binding in some instances united the lower edge of the dress to the water-proof protector or facing, as illustrated by the left-hand sample No. 2 of said "Protector Samples." Another device was also sometimes em-

64 ployed, consisting of a strip of material known as "wiggan," the same being loose cotton fabric highly starched. This in some instances was applied flat to the inside of the skirt near the bottom, in a manner similar to the water-proof material I have before

described. In other instances this strip of "wiggan" was folded double, and then folded into transverse plaits or flutes, and these were secured by a line of stitching running longitudinally along the protector. This material was attached to the inside of the skirt near the lower edge, and sometimes projected below the lower edge of the skirt. I will now compare the letters patent of complainant with these pre-existing devices: I find the said letters patent expressly sets forth that the invention relates to an article, by which I understand that it is an article of merchandise independent of the skirt to which it is applied; that this article is intended to be applied to a skirt as a facing or protector; that this protector is composed of enameled cloth or other water-proof material, and that this material is not to be flat, as it before had been used, but that it is fluted or plaited transversely. The right-hand samples on the Exhibit "Protector Samples" illustrate the invention, as I understand it, of complainant. The article of manufacture, in all instances, consists of a strip of plaited material, composed either wholly of a water-proof cloth, or of a plaited fabric having water-proof edge, as illustrated by the black sample attached at the right of No. 1 on said "Protector Samples." As I understand the letters patent of complainant to relate to the article of manufacture, no matter how it may be applied to the dress, I consider that the plaited water-proof protector may hang loosely inside the bottom of the skirt, the same being connected at the top edge only, as illustrated on "Protector Samples" No. 1, No. 3, No. 4, and No. 5, or the lower edge may be secured by a binding, as illustrated by No. 2 of said "Protector Samples." From the foregoing it will be apparent that the patent of complainant, in my judgment, and in view of the state of the art, is to be limited to a skirt protector similar in every respect to that which had been made before out of "wiggan," a water-proof material being substituted for the wiggan, and made up with flutes or plaits, instead of being used flat, as the said water-proof material had before been used; or, in other words, it is to be limited to the water-proof
65 material when made up in the form of a strip with transverse flutes or plaits, instead of being used as a flat strip.

Int. 4. Does the patent describe or suggest anything as the invention of the patentee except the making of a plaited protector water-proof, either by composing it entirely of water-proof cloth or binding it with water-proof cloth?

Ans. It does not.

Int. 5. Examine the DeForest letters patent No. 61172, Jan. 15, 1867, and the Day letters patent No. 161,012, dated March 23, 1865, and compare the protectors therein described with the "Morrison Protector, 1859," and state wherein the improvement, if any, found in those patents consists.

Ans. The Morrison protector is a fabric of uniform thickness, with a water-proof surface on one side; the same is adapted to protecting the skirt of the dress from moisture; but the protector itself is liable to be worn out and frayed, especially at the lower edge. The invention of DeForest related to a device that was a protector similar to the Morrison protector, so far as keeping the dress from becoming

wet, but with the addition of a wearing strip of India-rubber at the lower edge; said strip of India-rubber being very durable, and protecting the protector from wear. In the forms represented by Figs. 1, 2, 4, and 5 of the said DeForest patent, a strip of India-rubber is adapted, to be connected with the strip of muslin, or similar material, by the well-known process of vulcanizing, the surface of the said muslin being also rendered water-proof by a coating of India-rubber. This protector of DeForest I consider to be an improvement on the Morrison protector, because it has a durable wearing edge, and it possesses all the useful features of the Morrison protector, because the fabric that extends above the India-rubber strip is rendered water-proof by a coating of India-rubber. In the Day patent, 161,012, I find that a strip of enameled cloth, rubber, muslin, or similar material, is described, and in the "Complainant's Exhibit Infringement," said to be the subject of this suit, I find a band of enameled cloth also corresponding with the description in the patent. The invention of the said Day, as I understand it, did not relate to this strip of facing or water-proof material, but it did
66 relate to a peculiar strip of India-rubber sewed to the aforesaid strip, and forming a skirt protector. The peculiarity of this strip of rubber consisted in providing a thin portion or web, through which the stitches passed, so that the thicker portion or rib of India-rubber protected the stitches, and at the same time formed a durable edge to the skirt protector.

Int. 6. Wherein does the Day protector differ from the DeForest?

Ans. The Day invention is an improvement on the DeForest, because special provision is made in the Day patent for protecting the stitches, said stitches passing through a thin web. This allows for the rubber edge being attached to a strip of enameled cloth or any other suitable fabric, and renders it unnecessary to make use of the vulcanizing process in securing the strip of India-rubber in its place. In the Day protector, if the strip of India-rubber is removed by cutting the stitches, nothing will be left but a strip of water-proof cloth similar to the Morrison protector.

Int. 7. Now, compare the Macdonald protector with the Morrison one, and also the Day protector with the Morrison one, and show wherein each of them differs from the Morrison protector, and whether they differ in the same way and with the same effect.

Ans. The Macdonald protector is nothing more or less than the Morrison protector folded with traverse plaits or flutes sewed together to keep these plaits or flutes in their place. In the Day protector there are not any traverse plaits or flutes. The water-proof material is flat, the same as in the Morrison protector, and the Day protector is nothing more or less than the Morrison protector, with a strip of ribbed India-rubber sewed to the same near one edge. In both the Morrison and Macdonald protectors the wear comes directly upon the surface of the enameled cloth itself, and the only effect of the Macdonald plaiting or fluting is to give an ornamental appearance, as shown in Fig. 2 of her patent, and increase the amount of cloth made use of. In the Day and DeForest protectors the fabric itself is protected by the strip of India-rubber. The object of the

Macdonald invention is to flute or plait the Morrison protector and convert the roll of plain enameled cloth into a roll of fluted enameled cloth as an article of merchandise corresponding somewhat to the magic fluted ruffles as compared with the plain strip
67 out of which they are made. The object of the Day and the DeForest invention is to increase the durability of the Morrison protector by arming one of its edges by a cord or strip of rubber, which promotes its durability. The purposes, objects, and effects are entirely distinct, and no person purchasing or using the protectors could mistake the one for the other.

[Adjourned.]

NEW YORK, *Sep.* 30, 1879.

Cross-examination by Miss HELEN M. MACDONALD:

[Complainant objects to the evidence of this witness because it is incompetent, irrelevant, and immaterial, and inasmuch as it relates to facings which have been passed upon and decided by Judge Shepley to be entirely different articles from skirt protectors. Complainant objects to the testimony in regard to the DeForest patent because said patent was passed upon and decided by Judge Lowell to be some years later than the complainant's invention.]

Cross-int. 7½. Mr. Serrell, what is a binding? I refer to the article as used upon the lower edge of ladies' dress skirts, and upon the edges of gentlemen's coats, vests, etc.

Ans. The term "binding" is variously used in connection with articles of apparel. In some instances this term is applied to a strip or ribbon of material wrapped around the edge of the garment. In other instances this term "binding" is applied to a strip or ribbon of material sewed flatwise upon the surface of the garment, one edge of which binding coincides with, or is near, the edge of the garment. In other instances the term "binding" is applied to a cord sewed to the very edge of the garment. In other instances the term "binding" is applied to a cord inclosed in a folded strip of fabric and sewed near the edge of the garment.

Cross-int. 8. Does not a binding always bind two or more things together, as the dress material and facing of a dress, the raw edges of a coat, the leaves of a book, etc.?

Ans. Not always. A binding may be a protection to a single thickness.

Cross-int. 9. Do you mean by that that a single edge of cloth can be, and is frequently, bound with a braid or binding?
68 Ans. It can be, and sometimes is; for instance, the binding upon the edge of a felt hat is always applied to a single thickness.

Cross-int. 10. You have said, in answer to the 7th cross-interrogatory, that the term "binding is applied to a cord sewed to the very edge of the garment." In that case would not the cord be called a cord? Why should it be called a binding when it does not enclose an edge or edges?

Ans. I have frequently heard the term "cord-binding" applied in the trade to a cord sewed upon the garment as indicated.

[Answer objected to as not responsive to the question.]

[Witness continues:] I cannot say why the term is made use of; it is not in my province to answer. All I know is that it is so used.

Cross-int. 11. Do you state from personal knowledge that a cord sewed to the "very edge" of a garment serves as a binding for that garment?

Ans. From my personal knowledge I know that the term binding is frequently applied by tailors to a cord sewed to the edges of a garment. That cord serves as a protection to the edge, and the term "binding" has become so indefinite and extended in its meaning that I consider it properly applied to a cord at the edge of a garment.

Cross-int. 12. Will you please look at "Def'ts' Exhibit Protector Samples," and say whether or not the plain piece of enameled cloth on the left-hand side "swatch" No. 1 is a binding, and please understand that I mean to refer to only the ordinary binding for the bottoms of dress skirts?

Ans. Whether the piece on the left-hand "swatch" No. 1 is a binding or not would depend somewhat upon its mode of application to the garment. If it were simply attached at its upper edge I do not think it would be properly termed a binding. If it was attached at both edges, or if the lower edge passed around the bottom of the dress, and was attached, then the term binding would be appropriate.

Cross-int. 13. Then, in your opinion, a binding must always pass around the edge, and the edge be enclosed in, in order to be a binding. Am I right?

69 Ans. You are not. A binding may be flat without passing around the edge.

Cross-int. 14. Upon what articles of wearing apparel have you ever seen such binding applied?

Ans. I have seen binding of galloon, and also of velvet and of cloth, applied flatwise to the surface of dresses or coats, and I have also seen strips of enameled cloth applied in a similar manner, and flatwise within the skirt of a lady's dress above the lower edge, the lower edge of the enameled cloth and the lower edge of the dress corresponding, or nearly so. In this case the strip of enameled cloth served to protect the inner surface of the dress skirt from injury by contact with the pavement.

Cross-int. 15. Would you call a strip of velvet sewed flatwise on a lady's dress a binding? I refer to the article after it has been sewed on.

Ans. I should, in the same sense as a strip of galloon when similarly applied. The velvet in that case, however, is generally introduced for the purpose of ornamentation. I have seen velvet applied around the edge of a garment, and also flatwise upon the surface, at a greater or less distance from the edge, in precisely the same manner as galloon bindings.

Cross-int. 16. Would not these articles be called trimmings by dress-makers?

Ans. Some parties might call them trimmings. I do not suppose that the article would be altered by the name made use of in speaking about it.

Cross-int. 17. Please look at "Def'ts' Exhibit Protector Samples," and state whether or not there is, on that exhibit, any "ordinary binding" for the bottoms of ladies' dresses.

Ans. By the term "ordinary binding" I presume the question intends to relate to a binding which is the most commonly used. I answer that question by saying that the braid sewed around the edge, near where the labels Nos. 1, 3, 4, and 5 are applied, is one of the most common kinds of binding.

Cross-int. 18. Is it what is commonly used on the bottoms of dress skirts?

70 Ans. It is similar to that which is commonly used. The colors vary, and the material out of which the braid is made also varies.

Cross-int. 19. What is a dress facing?

Ans. I have seen dresses to which a device was applied called a facing, the same consisting of silk or other ornamental material, generally applied flatwise to the surface of the garment, and generally near the edge of the garment. I think the term facing is a trade term, made use of principally by dress-makers, without a very well-defined meaning. Tailors, also, sometimes use the term when speaking of the lining portion of a coat, inside the front or breast portion of the coat.

Cross-int. 20. What is a dress facing, as applied to the lower portion of a lady's dress?

Ans. I do not remember to have heard the term facing used in that connection; still it may have been so used. The fabric at the inside of a lady's dress skirt, near the lower portion, I have usually heard called a lining.

Cross-int. 21. What would you call that fabric when it extends clear to the top of the skirt?

Ans. A lining.

Cross-int. 22. Please describe the fabric which extends around the inside of the lower portion of the skirt, and which you have termed a lining.

Ans. In some instances ladies' dress skirts are lined with a fabric extending from the top of the skirt, or near the top of the skirt, to the lower edge. In some instances a strip of glazed muslin or other fabric is applied within the skirt, extending upwardly from the lower edge. This may be either upon the lining or upon the dress fabric, and is usually introduced as a protection to the skirt or skirt lining from wear.

Cross-int. 23. How wide is this lining—I mean measuring from the lower edge upwards?

Ans. I have seen them varying in width from two inches up to about a foot; in other instances, and which becomes a lining more

properly, I have seen them extend eighteen inches to two feet, and sometimes to the top of the skirt.

Cross-int. 24. Do they extend all around the inside of the skirt?

71 Ans. In some instances I have seen them extend all around, and in other instances only at the back portion.

Cross-int. 25. About what per cent. of all the dresses you have seen does this lining extend only around the back portion of the skirt?

Ans. That would be impossible for me to answer, because the fashions change from time to time, and with long, trailing dresses this protection is generally applied at the back; and with short dresses, generally all around the lower portion, to give the same fulness.

Cross-int. 26. You were not asked about a protection, but about a facing, or, as you please to term it, a lining for the bottoms of dress skirts. Now, will you please answer the question?

Ans. My answer applied to the device referred to in the last question, namely, a lining, or what the question terms a facing, of glazed muslin, or similar material, applied in the manner indicated.

Cross-int. 27. Is this matter of facing, or lining, as you have designated them, governed by fashions, as are the other portions of the dress, trimmings, style, etc., and are they generally displayed in French fashion-plates, as are the exterior parts of the dress, etc.?

Ans. I consider that these matters of linings, or, as they are termed in the question, facings depend upon the judgment of the person making or ordering the dress. I do not call to mind any instance where I have seen them displayed in fashion-plates.

Cross-int. 28. Is it, in your opinion, necessary for every street dress to have a facing?

Ans. I don't think it is necessary. Ladies can hold up their dresses if they like.

Cross-int. 29. Then you think that a street or short dress can be made just as substantially, and to hang just as well, without a facing or lining, as you have termed it, provided the wearer always holds it up, do you?

Ans. I do not consider it necessary to hold up short dresses. I think a lining always adds to the durability of a dress.

Cross-int. 30. In answer to cross-int. 7 you said: "In some instances this term (binding) is applied to a strip or ribbon of material wrapped around the edge of the garment." When applied in

72 that way to the lower edge of a dress skirt, does the binding extend clear around?

Ans. When a binding extends all around the edge of a dress skirt, then it is properly termed a binding.

Cross-int. 31. When a piece of skirt braid is bound over the edge of the skirt, and extends only a part way around, what would you call it?

Ans. I should call it a binding.

Cross-int. 32. When it extends clear around what do you call it?

Ans. A binding.

Cross-int. 33. Is there, in your opinion, any difference between skirt facings, skirt bindings, and skirt protectors?

Ans. The term binding is more generally employed in connection with a narrow strip of material enclosing the edge of a skirt. A facing, inquired about in the question, I understand to be a lining inside the skirt, near the bottom. All of these devices are skirt protectors. The braid protects the edge of the skirt, more or less, according to the width of the braid and its mode of application. "The facing" also protects the dress, and this facing or lining will serve as a protector, to a greater or less extent, according to the material of which it is composed and the circumstances under which the dress is intended to be used. When this facing or lining is made of glazed muslin, it forms a protector sufficient for a dress only to be used in-doors. When this lining or facing is rendered water-proof, or made of water-proof material, it is a protector adapted to street dress. I do not understand that the term skirt protector is limited to any particular kind of material, or has any specific designation in the trade to any one article.

Cross-int. 34. Is it not necessary to finish all street dresses on the lower edge with a braid or binding?

Ans. I think not always. The fabric of the dress may be turned under and upwards, and be protected by a water-proof fabric, or other suitable device, within the skirt, and extending as low as the lower edge.

Cross-int. 35. Have you ever seen a dress made in this way?

Ans. Yes.

73 Cross-int. 36. Where?

Ans. My own wife's, some years ago; the dresses not then being quite as long as they are now.

Cross-int. 37. How long ago did your wife wear this dress?

Ans. I can't say positively—I should judge nineteen years ago.

Cross-int. 38. Did this dress have a facing?

Ans. I remember distinctly seeing the lower edge of the fabric of the dress turned inward and upward, and that there was no binding to enclose the lower edge of the skirt. I am not positive as to what else there was on the said skirt, but I think there was a strip of some stiff braid attached at its upper edge inside the skirt, and hanging down as low as the lower edge of the skirt.

[Adjourned.]

OCTOBER 1, 1879.

Cross-int. 39. Have you read, and do you understand, letters patent No. 45840, granted to James A. Mackee, Jan. 10, 1865, for dress facings?

Ans. I have, and I do.

Cross-int. 40. Do you understand that facing, as Mackee describes it, is to be bound to the dress material with a skirt braid or binding?

Ans. In the said patent a band or braid is stitched to the dress and the water-proof material, same being marked *c*, and it is applied

to the bottom edge of the water-proof material inside the bottom of the dress.

Cross-int. 41. Do you mean by that that the braid or binding, *c*, is not folded around the edges of the dress material and facing, binding them together, but that it is fastened to the facing only?

Ans. There is no indication that the band or braid is folded. It appears to be placed flatwise upon the surface of the water-proof material, with its lower edge slightly below the water-proof material, the said braid being stitched to the parts in this position.

Cross-int. 42. Do you, as an expert in patents and dress-making, say on oath that the band *c*, in figure 2 of the Mackee pat-
74 ent, is not folded over the edges, and does not bind the facing to the dress material?

Ans. I do not pretend to be an expert in dress-making, but I do understand the manufacture of braids of devices, such as dress facing, to which the Mackee patent relates; and I am also familiar with the drawings and specifications of patents; and I say that the drawing in the Mackee patent shows the strip *c* flat and not folded.

Cross-int. 43. Is it not bound or folded around the edge of the dress as a finish to that edge?

Ans. It is not so represented. The drawing Fig. 3 represents the part marked A, forming the dress fabric, as folded inwardly and upwardly at its lower edge. The part marked *a*, representing the water-proof material, corresponds at its lower edge with the folded portion of the dress fabric, or nearly so. The part marked *c*, which represents the braid, is laid flatwise on *a*, and stitched to it, the stitches passing also through the dress fabric A. The portion marked *c*, which represents the braid, is not folded.

Cross-int. 44. Please look at "Complainant's Exhibit Infringement," and state whether that article is a skirt binding, as described by you in answer to the 17th cross-interrogatory.

Ans. It is not. In answer to the said 17th interrogatory, I referred specifically to one of the most common kind of skirt binding, namely, a strip of braid folded around the edge of the garment, and sewed to its place. In "Complainant's Exhibit Infringement" a strip of water-proof material is found, and upon the folded edge thereof a grooved strip of India-rubber is fastened by sewing.

Cross-int. 45. Please look at drawing of patent No. 35026, granted to Lucinda Humphrey April 22, 1862, for hoop-skirt, and state whether or not the Macdonald patent for skirt protector is an infringement of that article.

Ans. In the said patent of Humphrey the peculiarity relates to a water-proof skirt protector made of oiled silk or other suitable material, the same being attached to a lady's underskirt. It is especially adapted to form a sort of a pocket, into which the edge of the dress can be tucked; thereby the dress will be kept dry and from contact with the pavement. This patent of Lucinda Humphrey clearly indicates that it was not new with her in the year
75 1862 to employ a water-proof material in any manner for the protection of the lower edge of the dress. Hence she only claims the skirt protector made substantially as she describes

it. I do not consider that the Macdonald patent would infringe the Humphrey patent, but I do consider that the Humphrey patent shows clearly that Macdonald was not the first to use water-proof material for the protection of the lower edge of the dress; and that the Macdonald patent must be construed as applying to the specific device shown and claimed, namely, a dress protector of water-proof material made in the peculiar plaited or folded form described and shown in her patent.

Cross-int. 46. Supposing a lady's "underskirt" extends down only as far as her knees (which is usually the case), and is furnished with an oiled-silk pocket, as described in the Humphrey patent, would it be practicable, in your opinion, to tuck the lower edge of the dress skirt into that pocket to protect it?

Ans. I don't know where other ladies' skirts terminate, but I know that my wife's extends lower than her knees. If the skirt only extended to the knees, as contemplated by the question, the device of Lucinda Humphrey could be employed if the ladies desired to raise the lower edge of the dress as high as their knees and tuck it into the pocket. I am at a loss to see the relevancy of the line of questioning that has been pursued, and feel called upon to protest.

[Complainant states that the "relevancy of the line of questioning" is that the Lucinda Humphrey patent for a sack or pocket to inclose the lower portion of hoop-skirts has been put in evidence by the defendants as against the Macdonald patent for a dress-skirt protector, and that the witness has been put on by defendants as an expert in patents, and is expected to answer all questions in regard to that patent.]

[The witness has not declined to answer, but has simply entered a protest.]

Cross-int. 47. Did you apply for a patent in behalf of M. Herbert Chase, of New York, for a skirt protector in 1873?

Ans. I applied about 1873 for Mr. Chase. I think the initials are correct.

Cross-int. 48. Did you finish the application and take out a patent for said device?

76 [Objected to as irrelevant and immaterial.]

Ans. I think that the patent was prosecuted to issue, but that I did not attend to it through all its stages.

Cross-int. 49. Did you draw the specification?

[Same objection.]

Ans. I did.

Cross-int. 50. Was the said application of Chase put into interference with the application for letters patent of H. M. Macdonald?

[Same objection, and as incompetent.]

Ans. It was put into interference with an application of Miss Macdonald.

Cross-int. 51. Are skirt protectors usually sewed to the skirt facing inside the dress skirt, and after the dress has been finished and bound on the lower edge with a braid?

[Objected to as utterly immaterial.]

Ans. I have seen them on dresses in that position. I could not tell, of course, whether the braid was put on the edge before or after the skirt facing was applied, unless I was present when the dress was being made.

Cross-int. 52. Is the dress facing usually bound to the dress material with a braid, or does it hang loose and independent of the dress material?

Ans. I have seen, in many instances, the lining, which I presume is here called the dress facing, inside the lower edge of the skirt, and secured thereto by sewing and by a binding. I do not remember having seen the "facing" within a dress hanging loose. Skirt protectors frequently hang loose, and are attached only at their upper edge.

Cross-int. 53. Did you, when you made application for the Chase patent, mention the facing in your specification as a facing, or did you call it a lining?

Ans. I can't tell at this distant date. Either term might have been used, or nothing might have been said in regard to the device called a facing or lining.

Cross-int. 54. Do you deny that there is such a thing as a skirt facing, and that it is entirely distinct from a skirt protector, and serves for a different purpose on a dress?

77 Ans. I don't deny either one thing or the other. I have endeavored to give my testimony as to the things, no matter what they were called. A lining or facing is, to a certain extent, a protector, and a skirt protector in the form of a narrow strip is to a certain extent a lining. The articles, however, vary according to the peculiarities of construction, material, and mode of application.

Cross-int. 55. Early in your cross-examination you spoke of facings or linings of glazed muslin, and now you say that every facing is to a certain extent a protector. Do you mean that those facings of glazed muslin are impervious to moisture, and are a sufficient protection to the dress material of themselves without an additional protection of water-proof material?

Ans. I don't mean any such thing. I explained that the glazed muslin would probably be all the protection necessary for a house dress.

Cross-int. 56. Will you please look at "Defendants' Exhibit Protector Samples," and state which one illustrates the device described in the Macdonald patent?

Ans. The samples on the right-hand side illustrate the Macdonald device.

Cross-int. 57. "Swatch" No. 1 shows a "straight" piece of enameled cloth plaited, and bound on the top with a dress braid. Does

that, in your opinion, illustrate the device described in the Macdonald patent?

Ans. It does.

Cross-int. 58. In what way does it illustrate the Macdonald patent?

Ans. By corresponding to the drawing and specification.

Cross-int. 59. Do you find anything in the drawing and specification of the Macdonald patent that indicates that the exhibits from which these drawings were made showed the white back or foundation of the enameled cloth?

Ans. The specification of the Macdonald patent is very general. I do not discover anything with regard to color, whether it be white or any other color. All enameled cloth has a back, and that back may be white or colored.

78 Cross-int. 60. Well, do you think, from the specification and drawing of the Macdonald patent, that the exhibit sent to the Patent Office had a raw edge, as shown on "swatch" No. 1?

Ans. I don't know that I have any right to form an opinion on that point. The specification is silent, and I don't remember whether I have seen the samples in the Patent Office or not. I have a right to infer from the specification that the water-proof material in some cases has a raw edge, because the statement "bound with water-proof material" is used in the alternative. When it is bound there would be no raw edge. If it was not bound there would be a raw edge.

Cross-int. 61. Do the drawings and specification of the Macdonald patent indicate that her models or exhibits sent to the Patent Office were made of enameled cloth, which is water-proof, and bound on the lower edges with skirt braid, which is not water-proof, as indicated in "Defendants' Exhibit Protector Samples," which you say illustrate her case?

Ans. The specification and drawing of a patent are always separate and distinct from the model. Reference to them in the model are expressly prohibited. I can, therefore, tell nothing about the model from the drawing or specification. So far as the specification and drawing are concerned, there is nothing in them to indicate how the skirt protector is to be applied to the dress itself. A lady buying the skirt protector in the market would be at liberty to attach the same to the dress, as indicated in "Protector Samples" No. 1, No. 2, No. 3, No. 4; or, if she saw fit to bind the lower edge of that skirt protector with a braid, as in No. 5, she could so do. I do not discover anything in the patent pointing out the manner in which the skirt protector is to be connected with the skirt itself or limiting the manner of its application.

Cross-int. 62. Would a skirt protector made of enameled cloth, which is water-proof, and bound on the lower edge with a skirt braid, which is not water-proof, be a water-proof skirt protector?

Ans. The water-proof portion is a protection to the skirt. The propriety of binding a water-proof skirt protector with a braid which is not water proof is certainly questionable.

79 Cross-int. 63. Would not the braid soak up the dirt, moisture, etc.?

A. If it was not a water-proof binding it would.

LEMUEL W. SERRELL.

Attest: JOHN A. SHIELDS,
U. S. Commissioner.

DEFENDANTS' EXHIBIT DEFOREST PATENT.—J. A. S., *Com'r.*

Letters Patent of the United States No. 61172.

Granted THOMAS B. DEFOREST, Jan, 15, 1867.

Improvement in Bindings for Skirts.

Specification.

To all whom it may concern:

Be it known that I, T. B. DeForest, of Birmingham, in the county of New Haven and State of Connecticut, have invented a new improved binding for dress skirts; and I do hereby declare the following, when taken in connection with the accompanying drawings and the letters of reference marked thereon, to be a full, clear, and exact description of the same, and which said drawings constitute part of this specification, and represent sections of different forms of constructing the binding, enlarged.

This invention relates to an improvement in the binding for the skirts of ladies' dresses, and consists in the formation of a binding which shall present an edge of India-rubber or other flexible material below the edge of the skirt to protect the same from wear by contact with the floor or pavement.

80 To enable others to construct and use my improvement, I will proceed to describe the same as illustrated in the accompanying drawing.

The manner in which I prefer to form the binding is by the attachment of the gum to a ribbon or strip of ordinary binding and secure the two together by the process known as vulcanization. Such construction is shown in figures 1, 2, 3, 4, and 5, enlarged.

In Fig. 1, *a* is the binding, and *d* the rubber. The rubber is applied to the binding while in an adhesive or uncured state; or it may be cured rubber, the surface which comes in contact with the binding being coated with India-rubber gum, the two being attached together and secured by the ordinary process of vulcanization, and then the binding is stitched to the skirt in the usual manner; or, as seen in Fig. 2, two strips of binding, *a a*, are attached in like manner, the one lying upon the outside of the skirt, the other upon the inside, and in Fig. 3 a broad piece of binding is used and doubled so as to form two sides, and the doubled edge covered, as seen at *d*, Fig. 4, in like manner; or, as in Fig. 4, a round edge of rubber, *d*, may be in like manner secured to the binding *a*, or a flat piece of rubber, *d*, secured to the binding *a*, as seen in Fig. 5.

I thus far describe the rubber as attached to the binding by gum or the process of vulcanization; yet it may be done, as seen in Fig. 6, by stitching the binding *a* to the rubber *d*, as denoted at *f*.

If preferred, the binding itself may be thinly coated with India-rubber, and thus rendered water-proof.

The edge of the binding thus formed prevents the binding from being worn by dragging upon the floor or pavement, and the binding is thus prepared at a comparatively small cost.

By the expression of India-rubber edge I do not wish to be understood as confining myself to this material, but to any kindred flexible material.

Having thus fully described my invention, what I claim as new and useful, and desire to secure by letters patent, is—

A binding presenting an India-rubber or similar flexible edge, substantially as herein described, as a new article of manufacture.

THOS. B. DEFOREST.

Witnesses:
E. SHUSTER.
DANIEL S. LATHROP.

81 DEFENDANTS' EXHIBIT MACKEE PATENT.—J. A. S., *Com'r.*

Letters Patent of the United States No. 45840.

Granted JAMES A. MACKEE, Jan. 10, 1865.

Improvement in Dress Facing.

Specification.

To all persons to whom these presents shall come:

Be it known that I, James A. Mackee, a resident of Boston, in the county of Suffolk and State of Massachusetts, have invented a new and useful dress facing; and I do hereby declare the same to be fully described in the following specification, and represented in the accompanying drawings, of which—

Figure 1 a side view of such facing.

Figure 2 denotes its application to the lower part of a dress.

Figure 3 is a transverse section of figure 2.

Prior to my invention it has been customary to face the bottom of a dress with a band of leather or enameled cloth, or like material, having a water-proof glazing or surface. Owing to variations of temperature and other atmospheric changes the band, particularly at its upper edge, would become either elongated or contracted at times more than at others, and so as to pucker the dress and cause it to have a bad appearance where stitched to the band. Furthermore, owing to its stiffness, it becomes difficult to attach it, at its upper edge, to the dress without causing the dress to hang badly in its folds, or be liable to become worn and defaced along the stitching or seam.

In order to obviate these difficulties I have combined with the

glazed water-proof facing a thin flexible cloth band or glazed linen facing, the two being connected together, by laying one flatwise on the other, with the edge of one directly over that of the
82 other, or about so, and stitching or sewing the two together, and afterward unfolding the two.

In the drawings, *a* denotes the water-prooof facing, and *b* the thin linen facing, A being a portion of the lower part of a dress.

In applying the combination facing to a dress, the lower edge of the water-proof band is to be sewed to the bottom of the dress, and is to be protected by a band of braid, *c*, stitched to the dress and the water-proof facing. The flexible linen facing at or near its upper edge is to be stitched to the dress, the line of stitching being shown at *d*.

The combination band facing not only makes a better finish to the dress, but can be applied to much better advantage, and will operate much better than the single band of water-proof material.

I claim the new manufacture or combination dress facing, as composed of water-proof or enameled cloth band, and the flexible linen band, or its equivalent, arranged and connected together in manner and to be used substantially as specified.

JAMES A. MACKEE.

Witnesses:
R. H. EDDY.
F. P. HATE, JR.

DEFENDANTS' EXHIBIT HUMPHREY PATENT.—J. A. S., *Com'r.*

Letters Patent of the United States No. 35026.

Granted LUCINDA HUMPHREY, April 22, 1862.

Improvement in Skirt Protectors.

Specification.

To all whom it may concern:

Be it known that I, Lucinda Humphrey, of Tipton, in the county of Cedar and State of Iowa, have invented a new and useful improvement in skirt protectors; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the annexed drawing making a part of this specification, and to the letters of reference marked thereon.

83 The object of this invention is to protect the bottom of the skirts and dress from getting wet or soiled by contact with the ground when worn in wet weather, or when they may otherwise require such protection, and it consists of a strip of oiled silk or muslin, or other similar material, of length sufficient to extend around the lower periphery of the skirt, and of sufficient width to double over the edge, and extend upwards, on the inner and outer side, to the necessary height for that purpose. The oiled silk, or other material used as a protector, is secured to metal loops, which I prefer to make of steel, and which hook into eyelets, or are otherwise attached, on

the bottom of the petticoat. It may be worn under the dress, out of sight, on ordinary occasions, and, when desired, the wearer may tuck the bottom of her dress in a few minutes into the protector, and then proceed over wet or muddy ground without soiling her dress, and without being compelled to carry it raised in her hands.

To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and operation.

Figure 1 is a view of an ordinary hooped skirt, with the skirt protector of my invention attached ; and

Figure 2 represents the metal loops by which the protector is secured to the petticoat. The oiled silk, *a a*, extends around the lower periphery of the skirt, and is doubled up around the metal loops, *b*, to which it is attached, at the edges, to the points, *c* and *d*, of the loops. The edges of the protector are slightly gathered to make it set close. The metal loops have hooks at one of their points, *c*, that hook into eyelets on the bands, *e*, of the petticoat. The inner edge of the protector may be sewn to the lower hoop of the petticoat with its outer edge supported by the metal loops ; but I prefer the arrangement described, as it admits of the ready detachment of the protector when desired.

I claim as my invention : a skirt protector made substantially as described, out of any water-proof material, in combination with the lower portion of the petticoat.

LUCINDA HUMPHREY.

Witnesses :
G. P. INGMAN.
J. L. BRADSHAW.

84 *Evidence for Complainant in Reply. Evidence Taken on the Part of the Complainant under and Pursuant to the Sixty-Seventh Rule of the Supreme Court of the United States, as amended, before George A. Morse, Special Examiner.*

BOSTON, *December* 9, 1879.

Present : Helen M. Macdonald, for complainant ; Jabez S. Holmes, Esq., for Defendants.

Deposition of Charles H. Cummings.

CHARLES H. CUMMINGS, a witness called for the complainant, having been duly sworn, testified as follows, in answer to Miss HELEN MACDONALD :

Int. 1. Please state your name, age, residence, and occupation.

Ans. Charles H. Cummings ; age, forty-five ; Boston ; salesman.

Int. 2. Were you formerly in the employ of Shepard, Norwell & Co., of this city ; and, if so, in what capacity were you employed by them ?

Ans. I was ; as salesman.

Int. 3. Please look at Complainant's Exhibit A, and state whether or not Shepard, Norwell & Co. sold goods like that exhibit while you were with them.

Ans. I think they did.

Int. 4. Are you sure they did?

Ans. I am.

Int. 5. For what purpose was this article sold and used, if you know?

85 Ans. For a dress protector—skirt protector.

Int. 6. In answer to the 4th interrogatory you have said you were sure they (the defendants) had sold articles like this Exhibit A. Did you see such articles sold by them while you were there?

Ans. I did.

[This deposition is objected to as not in reply.]

[It is agreed that the cross-examination of this witness may be postponed to December 10, at 10 a. m., 1879, and that any and all objections to his evidence may be considered as taken when questions were put.]

CHARLES H. CUMMINGS.

Attest: G. A. MORSE,
Special Examiner.

Deposition of James G. Bowden.

JAMES G. BOWDEN, a witness for the complainant, having been sworn, testified as follows in answer to Miss HELEN MACDONALD:

Int. 1. Please state your name, age, residence, and occupation.

Ans. James G. Bowden; age, forty-three; salesman; reside at Marblehead, Massachusetts.

Int. 2. Please look at Complainant's Exhibit A, and state what it is, and for what purpose used.

Ans. Skirt protector; used to protect the lower part of the facing, braid, and lower portion of the dress from moisture and wear generally.

[Complainant offers protector, marked Exhibit B, in evidence.]

Int. 3. Please look at Complainant's Exhibit B, and state what it is, and for what purpose used.

Ans. It is a skirt protector; used for the same purpose as Exhibit A, just shown me.

Int. 4. Were you formerly in the skirt protector business, or agent for some manufacturing house to sell skirt protectors in Boston?

86 Ans. I was agent for a New York house, interested in the profits of the business in Boston, and sold skirt protectors in Boston.

Int. 5. For what house were you agent, and when did you make your first sales?

Ans. For Hernmann & Lautenbach, of New York. I sold waterproof skirt protectors, November, 1873. They were the first I sold.

Int. 6. Please look at Complainant's Exhibit A and the label thereon, which is marked "Day's Corrugated Dress Protector, patented March 23, 1875," and state if, in your opinion, that skirt pro-

tector is an infringement of the Macdonald Protector (Exhibit B), the patent on which was issued or granted September 29, 1874.

Ans. In my opinion it is.

Int. 7. Please look at Defendants' Exhibit "Morrison Skirt Protector, 1859," and state if, in your opinion, that article is or could be used for a "skirt binding."

Ans. In my opinion this article would never be used for a skirt binding.

Int. 8. Is it a skirt protector?

Ans. It is not, as I understand, a skirt protector.

Int. 9. Please look at the Defendants' Exhibit "Protector Samples," and state if, in your opinion, there is anything in that article to represent a skirt protector, with the exception of the piece of black material on the right-hand side of No. 1 of that "swatch," as the defendants have called it.

Ans. I should say that the black sample was the only one at all adapted for this purpose.

Int. 10. Please look at "Morrison's Protector, 1859," and state what it is, if you know.

Ans. It is a strip of enamel cloth.

Int. 11. You have already stated that you began to sell waterproof skirt protectors in November, 1873. Please state if you sold protectors of any description before that date.

Ans. I did. Protectors made of wiggan, which were not waterproof.

Int. 12. Please look at "Defendants' Exhibit Humphrey Patent," now shown you, and the drawings therein, which show a
87 hoop skirt with a pocket or sack of oil silk around the lower periphery, and state if that pocket or sack is or can be a protection to the outside skirt and dress skirt.

Ans. In my opinion it is not, and cannot be.

[Adjourned to Nov. 10, at 10 a. m.]

BOSTON, *November* 10, 1879.

Met pursuant to adjournment.

Present: Parties as before and E. N. Dickerson, Esq., of counsel for defendants.

Int. 13. Please look at Defendants' Exhibit A, which is a "Day" skirt protector, and Complainant's Exhibit B, which is a Macdonald skirt protector, and state if, in your opinion, the Day protector is as good an article as the Macdonald protector.

[Objected to: First. For assuming what is not true or proved in the case, that Exhibit B is a "Macdonald Skirt Protector," if by those terms it is meant that Exhibit B is the thing patented by the complainant.

Secondly. Because it is entirely irrelevant and immaterial which of the two samples of skirt protectors is the better one in the opinion of the witness.]

Ans. I think that Exhibit B is better than Exhibit A.

Int. 14. Please give your reason for so stating.

Ans. Exhibit A, Day's patent—it seems that the upper part of it is not made of rubber, and would not wear as long as if made of rubber, the lower part being stitched on. Stitches would be likely to grow rotten with use, while the other, being made of rubber, and all solid and in one piece, and the lower edge being vulcanized or cemented on, would wear much longer, in my estimation, than the other. It also, being cut on the bias, would be likely to fit a gored dress better than Exhibit A, which is a straight piece.

Cross-interrogations propounded by E. N. DICKERSON, Esq., of counsel for defendants:

Cross-int. 15. Define what you understand to be a "skirt protector," as you have used that term in your testimony.

88 Ans. I understand a "skirt protector" to be an article to protect a portion of the facing and the braid, also a portion of the dress, from wear, or being soiled or wet by coming in contact with the sidewalk or street.

[Counsel for the defendants, having read the deposition of this witness, and having been informed by Mr. Holmes, and by the commissioner, that the deposition was taken yesterday, subject to all objections that might be made to it when he should see it, now specifically objects to the 7th interrogatory to this witness as an attempt to prove infringement for the first time, and as not rebuttal, and he refers to the notice given to the complaint before the *prima facie* case was closed.

The complainant states that such an agreement was entered upon this record yesterday by Mr. Holmes. Unlike the defendants and their counsel, she, the complainant, is willing to keep her agreements to the letter, whether these agreements are filed in court or not.

If these defendants and their counsel had not treacherously broken their agreement, simply because that agreement was not filed in court, it would not now be necessary to take evidence in this case. Now I have got ahead of Mr. Dickerson; that is all I want. The complainant does not deny that agreement, but she objects to the counsel for defendants going over the evidence taken yesterday, and inserting what objections he has on blank lines he may there find. The complainant further states that, out of consideration for the judges, she intended at first to prove only infringement, and thereby save them the trouble of "wading through" all this useless and inappropriate matter of facings that have been passed upon and set aside by them.]

Cross-int. 16. Don't you understand that any water-proof fabric or material that will protect a dress or dress material from wearing or moisture is a dress protector?

[Objected to, because Defendants' Exhibit "Morrison Protector, 1859," is a piece of water-proof fabric which might have been, and perhaps was, used as a facing for the old-fashioned ungored or

straight skirts of those days, and, in that case, must have been bound in with a non-water-proof braid or binding, which, of course, is folded around the lower edge, binding it to the dress mate-
89 rial and making it a facing, which the braid and binding would be unprotected, and soak up dirt and moisture.]

Ans. I should not think that a dress protector which did not project below and protect the braid would be a sufficient protector. Neither would an article with a raw edge, in my estimation. Even if of a water-proof material, I do not think it would be a merchantable article.

Cross-int. 17. Is not any strip of water-proof material, going between the lower edge of the dress, the floor, or pavement, a "skirt protector," no matter what width it may be?

Ans. It might be, in a more or less degree.

Cross-int. 18. Don't you know whether it is or is not a "skirt protector" as you understand that term?

[The counsel for the defendants here states the complainant passed behind the witness and said "Yes," and the witness, being asked, states that she did say so.

The complainant states that she has frequently seen Mr. Dickerson——

Complainant here requests examiner to take down what counsel for defendants has to say.

The counsel for defendants here requests the examiner to take down every word said—not striking out any part after it has been uttered or written.

Complainant says: "Mr. Morse, you are no longer employed by me. If a man was taking the evidence it would not be so. I must have a United States commissioner." Whereupon the examiner refused to proceed.]

[Adjourned *sine die*, at request of plaintiff, November 10, 1879.]

Attest: GEO. A. MORSE,
Special Examiner, by Agreement.

90 *Evidence for Complainant in Reply. Taken Pursuant to the Sixty-seventh Rule of the Supreme Court of the United States, in Equity, as Amended, before me, Eugene B. Hagar, Special Examiner.*

DECEMBER 18, 1879.

Present: The complainant *pro se.;* Edward N. Dickerson, Esq., of counsel for the defendants.

Deposition of James G. Bowden—Continued.

Cross-examination by EDWARD N. DICKERSON, Esq., of counsel for defendants:

[The plaintiff says: While taking evidence before Mr. Morse, the defendants' counsel ordered Mr. Morse to take down every word said by complainant. I thought that proceeding unfair, because I was

acting counsel, and because they had given no previous notice of their intentions to proceed in that way. It seemed to be the desire of Mr. Morse to obey every command given him by Mr. Dickerson, and to give to that personage the fullest liberty of speech, although that speech wrought confusion for me. At all events, there was much said by the learned counsel about "Billinsgate" and other offensive things, which were not recorded by Mr. Morse. Mr. Morse recorded a note for the defendants' counsel after the 18th interrogatory, but broke off or stopped in the middle of a note for the complainant, and commenced to write another for the defendants' counsel. It was at this point that I left the table and said to Mr. Morse, "You are no longer in my employ." I had no knowledge of anything that was put upon the record by Mr. Morse and defendants' counsel after that, until I called upon Mr. Morse to settle with him, when I found,
91 to my utter astonishment, that every word I had spoken while putting on my wrap and preparing to leave had been recorded, and misconstrued to suit the defendants' counsel and against me. In the next sentence (as they have got it), after the words, "Mr. Morse, you are no longer employed by me," I did not allude to Mr. Morse in saying, "If a man was taking this evidence," and so forth. What I meant to say was this, that if I was a man, and equal in law to the defendants' counsel, that he would not attempt to impose upon me as he had done. I did not allude to Mr. Morse in that statement, although I cannot just now recall my exact words. The note I asked to have recorded, and which Mr. Morse afterward refused to finish, was this: That, while taking evidence for the defendants in New York, the learned counsel for the defendants, on more than one occasion, prompted his witness, Day, although I made no note of it on the record.]

Cross-int. 19. I now ask an answer to the question you were prompted by the complainant to answer before, which is this: Don't you know whether any strip of water-proof material going between the lower edge of the dress and the floor or pavement is a skirt protector, no matter what width it may be?

Ans. It is.

Cross-int. 20. You have said that Complainant's Exhibit A was, in your opinion, an infringement of letters patent granted to the complainant September 29, 1874. Will you be good enough to state what you consider to be the thing patented in that patent?

[Objected to by complainant, because "Exhibit A" does not appear to be here, and because it does not appear that this witness has ever read the patent mentioned.]

Ans. I consider that Miss Macdonald's patent covers a water-proof skirt protector, and the other infringes it, because it is of later date.

Cross-int. 21. Did you ever read the patent in question?

Ans. I think I have.

Cross-int. 22. How long ago?

Ans. I don't know how long ago.

Cross-int. 23. Was it within a year?

Ans. I think it was; in fact I know it was.

Cross-int. 24. Look at the copy of the patent now shown
92 you, and say if it does not describe and exhibit, in a drawing, a fluted or plaited skirt protector, and nothing else.

[Objected to by complainant as incompetent, and because fluting or plaiting, as everybody knows, means (in connection with skirt protectors) only style or fashion, which has to be changed often. In fact, the trade constantly demanded new styles or fashions of this article; but the principle, to wit, a strip of water-proof material between the lower edge of the dress and sidewalk or pavement, remains the same, no matter what the style may be.]

Ans. It does describe a fluted or plaited skirt protector, but bound with or composed of enameled cloth or other water-proof material. I consider the style of the protector immaterial, provided it is water-proof.

Cross-int. 25. Then you consider that this patent describes, substantially, a strip of plain enamel cloth or other water-proof material, as well as a strip of plaited or fluted enamel cloth or other water-proof material shown in Fig. 1 of the drawing?

[Objected to, as incompetent and irrelevant.]

Ans. I do.

Cross-int. 26. Fig. 1 shows simply a band of plaited or fluted water-proof material attached to a heading (letter A), and tacked by a row of stitching, along the middle of it, to keep the plaits in place, doesn't it?

Ans. It does.

Cross-int. 27. If that strip were plain enamel cloth instead of plaited, it would need no heading (lettered A), nor row of stitching through its middle, would it?

[Objected to by complainant as incompetent and irrelevant, and because the witness has already said that form or fashion means nothing in these articles; and because Fig. No. 1, in the Macdonald patent, was only made to represent what might be done or made of suitable material; this exhibit being made in the early part of 1873, when no water-proof material was in the market except ordinary enamel cloth with a coarse white back, which, of course, had to be covered, and which was not at all suitable for an article of merchandise.]

Ans. I would like to say that I do not consider ordinary enamel
cloth suitable to make skirt protectors of. I have never, to
93 my knowledge, seen any made of it. I do not think a plain strip of water-proof material would need to be stitched in the centre or to have a heading.

Cross-int. 28. Then, a drawing of a plain strip of water-proof material, as wide as Fig. 1, and as long, without stitching through the middle or a piece sewed to the top of it called a heading, would, in your opinion, represent the thing described in that patent substantially, and be substantially the thing shown in Fig. 1?

[Objected to as incompetent and immaterial, and because a strip of plain water-proof material, such as defendants' counsel has described, would be a strip of ordinary enamel cloth like Defendants' Exhibit "Morrison Protector;" and which, from the nature of the article, shows that if used at all in connection with the lower edge of the dress, it must be bound to the dress material with a braid or binding, and in that case would be a facing.]

Ans. I consider that if it is not shown in the figure it is described in the specification.

Cross-int. 29. Then, any strip of enamel cloth or other water-proof material not being fluted or attached to a band, but being substantially as wide and as long as the piece in Fig. 1, is, in your opinion, substantially the thing claimed in this patent in these words: "As a new article of manufacture, a skirt protector, having a fluted or plaited border, bound with or composed of enamel cloth, or other water-proof material, substantially as and for the purposes set forth"?

[Objected to as irrelevant, incompetent, and because it does not appear that the witness knows how wide or how long Fig. 1, or the article from which this drawing was made, was.]

Ans. I think any skirt protector of water-proof material, merchantable to-day, is covered by this patent.

Cross-int. 30. I desire an answer to the specific question, which is this: Is any strip of "enamel cloth, or other water-proof material," two inches wide and long enough to extend around the back part of an ordinary dress, when sold in a shop, the thing specified in this patent in the claim quoted in the last question?

[Objected to by complainant, because such a thing as the counsel describes is not, and never was, sold in any shop as a skirt
94 protector. The article he describes was sold previous to 1866 as a facing for the old-fashioned ungored straight skirts which were worn previous to that year, and because those articles were not finished on their lower edges with a thick or plaited edge, or anything to prevent them from fraying or ravelling; therefore they were in every case bound in with the braid, and, of course, became facings.]

Ans. I consider that all skirt protectors of water-proof material since this patent was issued are covered by it.

Cross-int. 31. Is a strip of plain enameled cloth, or other water-proof material, about two inches wide and about two or three yards long, folded up like Exhibit B, and sold in the shop, substantially the thing described in the claim of this Macdonald patent?

Ans. I never saw or knew it to be sold in the shop.

Cross-int. 32. Is a strip of plain "enameled cloth, or other water-proof material," about two inches wide and about two or three yards long, folded up like Exhibit B, substantially the thing described in the claim of this Macdonald patent?

[Objected to by complainant, because the strip of plain enameled

cloth, as the learned counsel has described it, never was sold as a skirt protector, and could not be sold at the present day for a skirt facing, because it cannot be applied to gored skirts that are now universally worn.]

Ans. I never saw a skirt protector made that way. In my opinion, all skirt protectors of water-proof material made since this patent was granted are covered by it.

Cross-int. 33. Do you understand the last question? If you swear you do not I will try to make it plainer.

Ans. I understand that I have answered it.

Cross-int. 34. The case I put is a strip of plain enameled cloth about two inches wide and about two yards long, and folded up in six folds like Exhibit B; do you understand the thing thus described and suggested to you, or do you not?

Ans. I never saw a skirt protector of that kind.

Cross-int. 35. Do you refuse to answer the question whether you do or do not understand the strip of enameled cloth described in the last question?

95 Ans. I have not refused, and have answered the question as I understand it.

Cross-int. 36. Do you understand the thing described in that question, namely, a strip of enameled cloth about two inches wide and about two yards long, folded up like "Exhibit B," and I ask an answer, yes or no, to this question. I have not asked you whether it was a protector or whether you ever saw a strip of enameled cloth in your life. I only wish to know whether you understand the thing described in the question, without any regard to its uses or purposes?

Ans. I do.

Cross-int. 37. Is that thing which you now understand substantially the thing described in the patent in the words of the claim? If not, tell me why not.

Ans. Because I do not consider a piece of enameled cloth would be adapted to skirt protectors, as described in this patent.

Cross-int. 38. [Question repeated.]

[Objected to by complainant, because the witness has already said he never saw such a thing, and because he has not been qualified as an expert in patents, he simply being a salesman, and knowing these articles as articles of merchandise.]

Ans. I do not think it is suitable for a skirt protector or was ever used as such; but if it could be, I think it would be covered by this patent.

Cross-int. 39. Why is it not suitable in your opinion?

Ans. Because enameled cloth is too heavy, and, being white upon one side, would show beyond the dress.

Cross-int. 40. If the thing shown in Fig. 1 of the patent was made of enameled cloth, would that be a skirt protector, as you understand it?

[Objected to, because the thing shown in Fig. 1 of the complain-

ant's patent was made to represent a skirt protector, but, being made of heavy enameled cloth, although it represented a skirt protector, was entirely unfit to sell for that purpose.]

Ans. If such a thing could be or was made, I should think it would be covered by this patent.

96 Cross-int. 41 .Isn't it covered by this patent, whether it was ever made or not, as you understand the description of the patent?

Ans. As I understand it, any skirt protector of a water-proof material is covered by this patent.

Cross-int. 42. Doesn't Fig. 1, if the thing was made of enameled cloth, show a skirt protector, as you read this description? If not, what other material is described in the patent by name to be used in making such a thing as Fig. 1?

Ans. If used and sold as a skirt protector, I should say it was a skirt protector.

Cross-int. 43. And isn't it equally a skirt protector if made of enameled cloth, but not plaited or fluted, if used and sold as such?

Ans. If used and sold as a skirt protector, I should say it was one, looking at it from a mercantile view.

Cross-int. 44. Look at Fig. 1, Fig. 4, and Fig. 5 of the drawing now shown you, and suppose them to be made of water-proof material where they are marked with the letter *a*, and to be made of vulcanized India-rubber where they are marked with the letter *d*, vulcanized fast to the cloth strip *a*, and suppose them to be sewed to the inside of a dress through the cloth *a*, having the rib *d* projecting below the bottom of the dress. Do you understand the drawing and description as I have given it?

[The complainant objects to the defendants' counsel putting in evidence a copy of the DeForest patent for "improvement in binding for ladies' dress skirts," because that patent was passed upon by the Hon. John Lowell, judge of the circuit court, district of Massachusetts, and decided by him to be some years later than the complainant's patent, and for assuming that which is false, to wit, that they are made of water-proof material where they are marked *a*, whereas the patentee, Mr. DeForest, plainly says that *a* is a piece of "ordinary binding enlarged," as is all the rest of his drawings, and because this matter of braids and bindings is not open for cross-examination.]

Ans. I think I do.

Cross-int. 45. Would such a thing as that be a protector, as you understand the Macdonald patent; and, if not, why not?

[Objected to as irrelevant and incompetent.]

97 Ans. If of a water-proof material at *a* and rubber at *d*, and wide enough to protect anything more than the braid, projecting below the braid, I should call it a skirt protector.

Cross-int. 46. Suppose they were made just as shown in the drawing, and of the materials suggested in the question, wouldn't they be skirt protectors, as you understand the Macdonald patent?

[The complainant objects to the defendants' counsel cross-examining the witness on a paper that has never been put in evidence, particularly because no opportunity has been given the witness to read the specification, and because this subject is not open to cross-examination, and because the DeForest patent shows a device for strengthening the braid or binding by attaching thereto a little piece of India-rubber, which, in all cases, must hang to the extreme edge of the skirt, and which he says is enlarged.]

Ans. If only wide enough to protect the braid, I should say they were braid protectors.

Cross-int. 47. You swore this morning that "any strip of water-proof material going between the lower edge of the dress and the floor or pavement is a skirt protector, no matter what width it may be," and you were prompted by the complainant to say "Yes" to that question when you were being examined before Mr. Morse, and you did say "Yes" to it to-day. Now, suppose the things to be made like Fig. 4, for example, of the materials already described, and attached to the inside of the dress so as to present the India-rubber, *d*, "below the edge of the skirt to protect the same from wear by contact with the floor or pavement," do you know any better name to call that thing than a skirt protector? And, if you do, suggest it and inform the court why it does not comply with your definition which the complainant whispered to you to answer "Yes" when the question was propounded to you.

[Objected to, because all the drawings in the DeForest patent show devices for strengthening braid or binding, said braid or binding to be folded over and around the lower edge of the dress skirt, binding the dress material and facing together, and in all cases extending clear around the skirt. As no dress is finished or can be finished without a braid or binding, this device of DeForest becomes a necessary and substantial part of the dress. And
98 because a skirt protector is an entirely different article, and serves for a different purpose on the dress skirt, all dresses are finished and complete without a skirt protector; and it is at the option of the wearer to sew one in if she chooses. If not, her dress is finished and complete. But the braid or binding becomes, in all cases, a part of the dress, because no dress can be finished without it.]

Ans. If it is of all water-proof material and protects only the braid, I should say it would be better called a braid protector. I think it would have to be wider to be a dress protector—wider than if it was only wide enough to protect the braid.

Cross-int. 48. How much wider than Fig. 4 of the drawing must it be in order to become a dress protector and cease to be a braid protector, Fig. 4 being about seven-eighths of an inch wide by measurement of the drawing?

[Objected to, because Mr. DeForest has said in his specification that he used an "ordinary binding," and because "ordinary binding, the thing universally used for binding the lower edges of dress

skirts, is seldom more than half an inch wide," and because he says that his drawings are "enlarged."]

Ans. If it was seven-eighths of an inch wide it would be more or less of a skirt protector, if properly applied, and would not cease to protect the braid, in my opinion.

Cross-int. 49. Do you know any better way to-day to make a skirt protector than a strip of flexible water-proof cloth, with a rib of vulcanized rubber vulcanized to the strip at its lower edge, substantially as shown in Fig 4 of the drawing exhibited to you, supposing it to be wide enough to perform the office it is designed for; that is, to protect the lower edge of the dress from wear by contact with the floor or pavement? If you do, describe the protector which you say is better.

[Objected to as incompetent, immaterial, and as not open on cross-examination.]

Ans. I think Miss Macdonald's "Exhibit B" is better.

Cross-int. 50. Isn't "Exhibit B" a strip of rubber cloth, with a band of rubber cemented to the lower edge of it for the purpose of taking the wear on the pavement, substantially like Fig. 1 of the DeForest drawing?

99 [Objected to by the complainant, because a part of DeForest drawing, marked "*a*," is, as he says, an ordinary binding "enlarged," and, of course, cannot be more than a half an inch wide and non-water-proof.]

Ans. If DeForest Fig. 1 were as wide as this "Exhibit B," of rubber and water-proof material, about the same length, sewed into the back of the skirt, projecting below the braid, I should say that it would be similar to that exhibit.

Cross-int. 51. Do you think that such a thing as Fig. 1 of the Macdonald patent, of proper length for the purpose, and made of enameled cloth or any other water-proof material, could be successfully sold in the market in competition with a strip of plain vulcanized rubber cloth, with its lower edge reinforced with a rib of rubber, substantially in the manner shown in the DeForest drawings, supposing the width to be the same in either case?

Ans. I should say Macdonald's "Exhibit B" was more desirable to-day than the other.

Cross-int. 52. And is not that because it is a plain strip of water-proof cloth reinforced at its edge with a wearing strip of rubber, which takes the wear on the pavement, and does not readily fray out, like a piece of enameled cloth or other textile fabric, presenting its raw edge to the pavement?

Ans. I can't say, but I think it operates better.

Cross-int. 53. Then you don't know why it operates better; is that what you mean to say?

Ans. I tell you what I think.

Cross-int. 54. Don't you know that the reason is that enameled cloth would wear out rapidly on the pavement unless protected by

such a substance as vulcanized rubber on its edge, which resists the wear and prevents the cloth from being frayed out?

[Objected to by complainant, because vulcanized rubber edges when sewed on as slightly, as unsubstantially as is the vulcanized rubber edge of Complainant's "Exhibit A," amount to nothing.]

Ans. I don't know as I ever saw enameled cloth with a rubber edge.

Cross-int. 55. Don't you know that "Exhibit B" has its chief value from the fact that the edge is protected by a strip of
100 vulcanized rubber, vulcanized to the cloth strip which is sewed to the dress, and without that rib of vulcanized rubber it would be very much less useful?

Ans. I think it is more desirable to have the rubber edge; it will wear better.

Cross-int. 56. Suppose the rubber rib were removed from it, leaving the water-proof cloth strip, would that be substantially the thing described and claimed in the Macdonald patent, as you understand it?

Ans. My idea of the Macdonald patent is that it covers all skirt protectors of water-proof material.

Cross-int. 57. And, of course, would cover "Exhibit B" if the rubber rib were removed from it. Is not that so, in your judgment?

[Objected to by complainant, because witness has already stated that some finish is necessary for the lower edge of the skirt protector to insure wear.

Counsel for defendants states the witness has said no such thing in this examination.]

Ans. I do not think "Exhibit B" without the rubber edge would be a merchantable article to-day.

Cross-int. 58. Do you think that Fig. 1 of the Macdonald patent made of enameled cloth would be a merchantable article to-day?

Ans. I think Exhibit "B" would be much better.

Cross-int. 59. [Question repeated.]

[Objected to by complainant, because Fig. 1 of the Macdonald patent is an illustration of a plaited or fluted skirt protector, and because skirt protectors of that style are not fashionable to-day.]

Ans. If plaited or fluted skirt protectors were fashionable, I think it might sell.

Cross-int. 60. [Question repeated.]

[Objection repeated.]

Ans. Plaited or fluted goods are not fashionable, and such goods would not sell to-day as well as "Exhibit B."

Cross-int. 61. Plaited or fluted protectors of enameled cloth have been superseded in the market by plain protectors, with a rib of India-rubber either vulcanized to their edge or otherwise attached to it. Is not that true, to your knowledge?

101 Ans. I never knew a skirt protector made of enameled cloth.

Cross-int. 62. Did you ever know of such a thing as Fig. 1 of complainant's patent made of enameled cloth being in the market?

[Objected to, because the complainant only used enameled cloth for her first models to the Patent Office, because there was no other water-proof material in the market at that time out of which she could make models, and although she has sold thousands of yards of "water-proof" skirt protector, she has not sold any of enameled cloth.]

Ans. I never knew of an enameled cloth skirt protector being in the market.

Cross-int. 63. Did you ever know of skirt protectors like figure 1 of complainant's patent made out of any water-proof material being in the market? And, if so, when and where? Who sold them?

[Objected to by complainant as immaterial, it having been decided that a water-proof skirt protector is a skirt protector, whether plaited, fluted, or not.]

Ans. I cannot remember just the shape, but think I saw something similar made of water-proof material at Russ, Cobb & Co.'s. I have no way of fixing the exact date. My impression is that it was some time in 1873—the latter part of 1873.

Cross-int. 64. What was the water-proof material out of which skirt protectors like Fig. 1 of the patent were made which were on sale in 1873, or thereabouts, by Russ, Cobb & Co.?

Ans. I don't know as I know what it was. It was not an enameled cloth with a white back.

Cross-int. 65. Since that time have skirt protectors of water-proof material, like Fig. 1 of the patent, been on sale, to your knowledge; and, if so, what merchants had them for sale?

Ans. I have not seen them lately.

Cross-int. 66. I now repeat the question which you tried to answer by saying that "Exhibit B," without the India-rubber rib, was not merchantable, and it is this: Suppose the India-rubber band or rib be taken off "Exhibit B," would the water-proof strip that remained be substantially the protector described and claimed in the Macdonald patent, as you understand it?

[Objected to by complainant, for if the rubber rib were taken off of "Exhibit B," it would leave only a part of a protector.]

102 Ans. As I understand it, the Macdonald patent water-proof skirt protector covers any water-proof skirt protector that has been on the market for sale.

Cross-int. 67. The question I ask is whether, in your opinion, it covers such a thing as "Exhibit B," with the India-rubber rib removed from it, leaving the plain strip of water-proof cloth? Do you understand that question?

[Objected to by complainant as incompetent.]

Ans. I never saw such an article; but if it could be used as a skirt protector I think it would cover it.

Cross-int. 68. Have you any doubt that it could be used as a skirt protector? And if you have, state your reason why you have that doubt.

Ans. I don't think it would be a merchantable article to-day.

Cross-int. 69. And the reason is that it would want the vulcanized rubber rib, that gives it its enduring power on its edge. Is not that so?

Ans. I think the rubber edge would improve its wear very much.

Cross-int. 70. Isn't the presence or absence of the vulcanized rubber rib on the bottom edge of the plain protector just the difference between a practically good skirt protector and a practically worthless one in the year 1879?

[Objected to by complainant as immaterial.]

Ans. I think a skirt protector with a rubber edge is very much better than one without; but if it had never been made with a rubber edge quite likely it might have sold for lack of something better.

Cross-int. 71. Do you know of any practically successful skirt protector for use on the street to-day which hasn't this rubber rib on the lower edge of it; and, if so, who sells it?

Ans. I do not.

[Defendants' counsel introduces in evidence an exhibit, which is marked "Defendants' Exhibit DeForest Drawing, Dec. 18, 1879, E. B. Hagar, Special Examiner."]

[Introduction of said last-named exhibit objected to by
103 complainant, because the DeForest patent for improvement in skirt bindings has been passed upon by Judge Lowell.]

[Adjourned to 10 o'clock a. m. on Friday, December 19, 1879, at same place.]

BOSTON, *December* 19, 1879.

Present: The complainant *pro se;* Edward N. Dickerson, Esq., and Jabez S. Holmes, Esq., of counsel for defendants.

James G. Bowden, the witness on the stand at the adjournment, having notified the examiner of his illness, by consent of parties, his examination was suspended.

The complainant introduces in evidence five exhibits, which are respectively marked by the examiner "Dec. 19, 1879, Macdonald Exhibit C; E. B. Hagar, Special Examiner;" "Dec. 19, 1879, Macdonald Exhibit D; E. B. Hagar, Special Examiner;" "Dec. 19, 1879, Macdonald Exhibit E; E. B. Hagar, Special Examiner;" "Dec. 19, 1879, MacDonald Exhibit F; E. B. Hagar, Special Examiner;" and "Dec. 19, 1879, Macdonald Exhibit G; E. B. Hagar, Special Examiner."

Attest: E. B. HAGAR,
Special Examiner.

Deposition of Helen M. Macdonald.

The complainant, having been duly sworn, testified as follows:

While experimenting with enameled cloth skirt protectors in the winter of 1872–'3, with a view to obtaining a patent, I used the common enameled cloth, like Defendants' "Exhibit Morrison Skirt Protector," to illustrate the article I wished to patent, simply because there was no other water-proof cloth in the market at that time. The uncertainty of obtaining a patent prevented me from ordering suitable material made. In other words, I was compelled to make my first models for the Patent Office out of this coarse, heavy enameled cloth for the want of a more suitable material. At that time the pub-
104 lic had never heard of such a thing as a skirt protector. In August or September, 1873, and when my prospects for obtaining a patent were good, I sent one yard of alpaca to the Taunton Oil Cloth Company, with instructions for them to water-proof it. They executed the order successfully, and returned the goods to me by mail; and I hear state, on oath, that I believe that one yard of alpaca was the first cloth that was ever rendered water-proof for the purpose set forth. This cloth I speak of, and the first skirt protectors I made for sale, are illustrated by this exhibit. The same article was put in evidence in the case of Macdonald *v.* Blackmer and others, and was alluded to as Complainant's Exhibit "23," page 138, interrogatories 33 to 36. Out of this one yard of water-proofed alpaca, which is illustrated in "Macdonald Exhibit E, E. B. Hagar, Special Examiner," I made samples of water-proof skirt protectors, which I sent to the Patent Office, in a letter dated October 2, 1873. In that letter I called particular attention to the samples, and the fact that they were made up with raw edges, as this Exhibit E illustrates. That letter will be found in the file-wrapper and contents, kindly put in evidence by the defendants. Now, I am very thankful to the defendants and their counsel for putting in evidence that very important document, to wit, file-wrapper and contents, because it will enable me to explain the matter so that the court will understand that the samples alluded to in that letter as having raw edges were made of japanned alpaca, and not common enameled cloth, which was entirely unfit for the purpose. Soon after I sent fifty yards of alpaca to the same company, which they water-proofed, and returned to me about the 27th day of October, 1873. The bill for these goods I have put in evidence, and it is marked "Macdonald Exhibit G." It is out of this lot of goods—if fifty yards can be called a lot—that I commenced to manufacture skirt protectors for the market; and so great was the demand for these goods that I sold five thousand dollars' worth, in the short space of six or seven months, to one house. I mention this fact just to show that there was a great demand for this article as a new article of manufacture. Defendants' "Exhibit Morrison Skirt Protector, 1859," is a strip of plain enameled cloth, and shows an article which was for sale in the market from the years 1862 and 1863 to 1866. It was sold and used as a
105 facing for the old-fashioned ungored or straight skirts of those years. It was attached, by the dress-maker or user, to

a piece of cambric at the top, and was then basted firmly and smoothly to the dress material, and bound to the dress material with a non-water-proof braid or binding. The cambric at the top was then stitched to the dress material, and the dress was considered finished, at least at the lower edge. "Exhibit Macdonald C" illustrates this enameled facing as it was applied to a dress skirt.

Fig. 1, in the drawing of the Mackee patent, illustrates the Mackee facing before it is sewed into the dress. Fig. 2 shows the facing after it has been sewed into the dress, and bound to the dress material with a braid "*c*." Fig. 3, which is a side view of the article, shows the process of putting on the braid "*c*." It was his intention to have the braid first sewed to the facing; and after the facing was basted into the dress skirt, to fold the braid "*c*" over the edge, and fell it or hem it down to the right side, or the dress material. I have, purposely, left a portion of the braid or binding on "Macdonald Exhibit C" open or unfinished, simply to make that matter clear. Mr. DeForest says, in his specification, letters patent No. 61172, dated Jan. 15, 1867, for improvement in bindings for skirts: "The manner in which I prefer to form the binding is by the attachment of the gum to a ribbon or strip of ordinary binding, and secure the two together by the process known as vulcanization. Such construction is shown in Figs. 1, 2, 3, 4, enlarged." I have before me two copies of the DeForest binding. The one in paper, put in by the defendants at an early stage of this case, the drawings of which, the accompanying specification says, are enlarged. If a piece of India-rubber was attached to a piece of ordinary binding, in any manner shown in these figures, and if it were only half as large as this drawing represents the articles to be, it would disfigure and ruin the appearance of the dress and wearer, and, in my opinion, no person lives who has used or seen this article used, although the patent is nearly thirteen years old. Letters patent No. 35026, dated April 22, 1862, "Lucinda Humphrey Hoop Skirt;" this patent shows a pocket or sack made, as she says, of oiled silk, and extends clear around the lower periphery of the skirt. This patent for a pocket or sack for a hoop-skirt was put in evidence by the defendants
106 as against the Macdonald patent, which is for a strip of water-proof material, sewed to the lower edge of the back part of a dress skirt, to wit, a skirt protector. The Lucinda Humphrey pocket or sack, for the lower portion of a hoop-skirt, had nothing whatever to do with the lower edge of a dress skirt, and I consider it almost needless to say that the "Macdonald Skirt Protector" could have nothing whatever to do with a hoop-skirt, if hoop-skirts were now worn. The defendants' expert, Mr. Serrell, testified that the Lucinda Humphrey pocket or sack for a hoop-skirt might be attached to the lower edge of a lady's "underskirt," and that the outside skirt and dress skirt might, in some cases, be tucked into this sack or pocket, and thereby be protected. As ladies' "underskirts" are always short—seldom extending below the knees of the wearer—I have only to say that I would rather Mr. Serrell's wife, if he has a wife, would wear such an arrangement than wear one myself. It seems to me that such a "fashion" would attract too much attention,

and would not be considered genteel by people of good taste. It is needless to add that such a thing was never done, and never could be done. I have before me Defendants' "Exhibit Protector Samples, J. A. S., Com." I find that the sample of skirt protector, on the right-hand side of No. 1, does represent a style of skirt protector that was once in the market. The article on the left-hand side of No. 2, which is a piece of enameled cloth, bound in with the braid or binding, represents the enameled cloth facings that were worn with straight skirts previous to 1866. With the exceptions of these two articles, there is nothing on this sample that represents a skirt protector or a facing. Taken as a whole, Defendants' "Exhibit Protector Samples" may be termed trash; and its appearance suggests that it might have had its origin in some lunatic asylum, possibly Blackwell's Island or Bloomingdale. At all events, such articles were never worn, and never could be worn, with the exceptions of No. 1, black, on the right-hand side, which represents a skirt protector, and No. 2, on the left-hand side, which represents what might have been a facing on the old-fashioned straight or ungored skirts, which were worn previous to 1866.

[Counsel for the defendants objects to the adjournment of the examination at this time, 3.55 p. m., and gives notice to the
107 complainant that any attempt on her part to carry into effect the suggestion made by her in the presence of the examiner, that her time for taking testimony might be extended, will be resisted to the utmost. Counsel for the defendants are ready to proceed with this examination at all hours, by day or evening, until the expiration of the time given the complainant by the court for closing her proofs.

Counsel for the defendants also requests the examiner to note that the complainant withdrew herself from the examination from quarter past twelve to two o'clock to-day.

The complainant states that she has worked for four hours taking evidence in this case to-day, and feels unable to work longer. That while taking defendants' evidence in New York she conformed to their wishes in regard to adjournments; that she is willing he should resist to the utmost her motion for extension of time. In fact, she expects no consideration or gentlemanly treatment from this brave (?) man, whom she believes purposely made trouble between Mr. Morse and herself, well knowing that it would take at least one week of her time, which was short, to notify him again; she also believes that it was his intention, since commencing again this time, to use up the remaining portion of her time in worrying a sick man with senseless and absurd cross-questions, and she firmly believes that if Mr. Bowden had not been taken sick it was the purpose of this learned counsel to continue that cross-examination until the complainant's time had expired.]

[Adjourned at 4.15 p. m. to Saturday, Dec. 20, 1879, at 10 a. m., at the same place.]

BOSTON, *Dec.* 20, 1879.

Present: Complainant, *per se;* Jabez S. Holmes, Esq., of counsel for defendants.

Complainant continues her testimony as follows:

In the original case of Macdonald *v.* Blackmer and others, Charles Francis, one of defendants' witnesses, testified, on page 79, ints. 3, 4, and 5: "I can't give the exact dates, because my books were burned, but I saw goods like this 'Exhibit 10' (which was Mackee's patent combination dress facing, and is illustrated in 'Mac-
108 donald Exhibit C') some time between 1864, 1865, and 1866. It was sold for dress facings. I should think the sales of it would amount to forty thousand or fifty thousand during that time. It was sold both to jobbers and retailers. As near as I can remember, I should think most of the business was done in 1865." I think myself that Mr. Francis' statement is right. Defendants' witness, Day, has testified in the present case, in answer to the 29th cross-interrogatory, that, in his opinion, Defendants' "Exhibit Morrison Skirt Protector, 1859," would be a suitable binding for a dress of silk or satin. The same witness has sworn that, in his opinion, there was no difference in the three articles known as skirt protectors, skirt facings, and skirt bindings, and again swore that he had seen dress skirts having their facings on the outside of the skirts. These statements are so manifestly false and absurd that they hardly need contradiction, because they are plainly contradicted by common sense. Macdonald Exhibit D represents a gored dress skirt of the present fashion. This miniature dress skirt has all three of the above-named articles. The facing, which is made of ordinary cambric, extends clear around the inside of the skirt, and is bound to the dress material by the braid or binding, which also extends clear around the skirt. These two articles are absolutely necessary in every dress; in other words, a dress cannot be finished without them. In my opinion, they form part of the dress. But the strip of India-rubber which is sewed into the back part of the skirt, extending under the facing and lower edge, with the braid or binding thereon, is a skirt protector, and forms no part of the dress, because it is at the option of the wearer to sew one in her dress, if she chooses to do so; otherwise the skirt is finished and complete without it. This protector, although entirely separate from the braid or binding, is sewed on to hang underneath the braid or binding, and projects a trifle below, in order to prevent the edge of the dress and the binding thereon from wear, moisture, and dirt. I refer once more to Defendants' "Exhibit Morrison Protector," and firmly state it is not a skirt protector, and that it was never sold for a skirt protector, and that it could not be possibly used as a skirt protector; that the enameled cloth facings,
like those illustrated in Macdonald's Exhibit C, were used to
109 stiffen the skirt, improve its hangings, and so forth. The fact this article was bound to the dress material with a non-water-proof braid, which would, of course, soak up moisture and dirt, shows clearly that it was just what Mackee called it in his patent, and what Mr. Charles Francis called it in his deposition in the

Blackmer case—a combination skirt facing. As gored skirts became fashionable in the years of 1865 and 1866, this facing, and all other ready-made facings, fell to the ground as useless, for none of them could be applied successfully to a gored skirt, even as a facing.

[Evidence of complainant suspended by consent to enable William W. Churchill to testify at this point.]

Complainant, resuming her testimony, says: When I made my application for a patent, which was in May, 1873, I did not employ a solicitor, preferring to do the work myself. No doubt the file-wrapper and contents put in evidence by the defendants will show many mistakes. But the fact that I was the first to apply for a patent for a water-proof skirt protector cannot be denied. The defendants argue that I should be brought down and held to a plaited or fluted form of protector. In my opinion, form means only style or fashion. In order to make this article a success, a form or style must be changed often. Indeed, the trade is constantly demanding new styles or forms of this article, and I am of the opinion that the form or style of this article can be changed and varied in hundreds of ways. But, of course, the principle, which is a strip of water-proof material, between the lower part of the dress and sidewalk, remains the same whatever the form may be. The defendants have argued that I abandoned this invention to the public before making application for a patent, but I firmly state that I never allowed nor knew of the use of this article by any other person than myself prior to my application for a patent, and I so stated in the original case of Macdonald *v.* Blackmer, page 137, direct interrogatory 26. The article I first made, and attached to a dress skirt, is alluded to in the case Macdonald *v.* Blackmer and others, as Complainant's Exhibit No. 22. I now present myself to defendants' counsel for cross-examination.

110 Cross-examination by JABEZ S. HOLMES, Esq.:

Cross-int. 1. What do you mean by the term skirt protector?

Ans. Exhibit B, Macdonald Protector, illustrates what I mean by a skirt protector.

Cross-int. 2. Please state in words exactly what you mean by the term skirt protector as you have used it.

Ans. A skirt protector is a strip of water-proof material sewed to the inside of a dress skirt to hang between the lower edge of the skirt and the floor or pavement, extends only around the back portion of the skirt and a trifle beyond and below the braid, and may be variously finished on the lower edge.

Cross-int. 3. What difference, if any, does it make whether or not that strip of water-proof material is plaited or fluted?

[Question objected to unless the counsel states whether or not the plaiting or fluting he inquires about is to run vertically across the protector, or to be confined to the border, as is shown in "Macdonald Exhibit E."]

Ans. Fig. No. 1, in the Macdonald patent, shows a sample of skirt

protector made of enameled cloth, for the want of a better material. In that figure the plaits run vertically from top to bottom, but that was only made to illustrate the article I wished to patent. Skirt protectors made of that material in that style would not have sold as an article of merchandise, yet the principle of the water-proof skirt protector was there, and I had no other means of illustrating the article I wished to patent.

Cross-int. 4. Please answer my last question now repeated.

Ans. I suppose the principle is the same, whether the strip of water-proof material is plaited or fluted or not.

Cross-int. 5. Then any strip of water-proof material, whether plaited or fluted or not, coming between the skirt and the floor or pavement, is a skirt protector, is it not?

Ans. It is, but it requires some finish on the lower edge to insure wear.

Cross-int. 6. What finish?

Ans. There are many different ways to finish a skirt protector on its lower edge. The first I made were finished with a plaited
111 or fluted border, like "Macdonald Exhibit E." That went out of style, and I commenced to make them with a strip of India-rubber, vulcanized to the lower edge, like Exhibit B, Macdonald Protector, which added great strength and durability to the protector. I have just commenced the manufacture of another new style, having three to five cords of India-rubber moulded to its lower edge.

Cross-int. 7. What finish does a strip of water-proof material require on its lower edge to insure wear as a protector?

Ans. A band of India-rubber cemented to the edge, as shown in Exhibit B, Macdonald Protector, will finish the edge and insure wear.

Cross-int. 8. Would a strip of water-proof material without such band cemented or vulcanized to the edge be a skirt protector in your opinion? If not, why not?

Ans. It depends upon what that water-proof material is. If it was a straight piece of enameled cloth like "Defendants' Exhibit Morrison Skirt Protector," with a white back and no finish on its lower edge, it would not be a skirt protector, because if sewed on as a protector should be, having the lower edge a trifle below the lower edge of the dress skirt, the lower edge, being unfinished, would fray or ravel out, and present an unsightly appearance, and it would be impracticable, and no person would disfigure themselves with such a ridiculous device.

Cross-int. 9. Suppose the strip were of the width of Complainant's Exhibit B, and in all respects like it, except that it had no India-rubber vulcanized to one edge of the strip of water-proof material, would that be a skirt protector in your opinion? If not, why not?

Ans. Complainant's Exhibit B is a very different article from a strip of ordinary enameled cloth like that shown in "Morrison Protector." It is made of a fine black fabric, coated on one side with India-rubber. It is cut bias, and is essentially different from a straight strip of ordinary enameled cloth like this shown in "Mor-

rison Protector." Before this band or India-rubber edge was vulcanized to Exhibit B, the cloth part alone was a part of a skirt protector, or an unfinished skirt protector.

[Adjourned to Monday, Dec. 22, 1879, at 11 o'clock a. m.]

112 BOSTON, *Dec.* 22, 1879.

[At 11.10 o'clock a m., the complainant and the defendants' counsel both being present, the complainant says that, having forgotten something, she must take a recess of a few minutes, and she accordingly withdraws. On her return, there being also present Jabez S. Holmes, Esq., of counsel for defendants, at 11.35 a. m., cross-examination by Edward N. Dickerson, Esq.]

Cross-int. 10. Will you answer the question directly yes or no whether, if the vulcanized rubber strip were cut off the lower edge of Exhibit B, leaving everything else just as it now is, the remaining strip of rubber cloth would be a skirt protector as you understand that term as used in your patent?

Ans. To your very hypothetical question I can only give a practical answer, that if the vulcanized rubber edge were cut off Exhibit B it would leave a part of a skirt protector.

Cross-int. 11. Do you refuse to answer whether it would be a skirt protector substantially the same as the thing described and claimed in your patent?

Ans. I do not refuse to answer.[1]

Cross-int. 12. Then would it be substantially the same as the thing described and claimed in your patent?

Ans. If sewed into the skirt it would no doubt protect the skirt while it lasted, but it would be unpractical, because without the thick edge Exhibit B would not last so long, and it would not be a salable article.

Cross-int. 13. I have not asked whether it would be a salable article or whether it would protect a dress; the question is, whether it would be a "skirt protector," substantially the same as the thing described and claimed in your patent, about Fig. 1, of which patent you have already sworn that "skirt protectors made of that material, in that style, would not have sold as an article of merchandise," but which, I presume, you claim to be the thing patented, notwithstanding it would not be a salable article.

Ans. I said that Fig. 1 in my patent would not be salable because it was made of heavy enameled cloth, which was entirely unsuitable for such articles.

113 Cross-int. 14. Would Exhibit B, with the vulcanized rubber wearing edge cut off, be a skirt protector substantially the same as the thing described and claimed in your patent, or would it be only a part of a skirt protector, and not an entire one?

Ans. Cut the edge off Exhibit B and sew the remaining portion into a dress skirt, so that it will hang between the lower edge of the skirt and ground or pavement, projecting slightly below the edge and braid or binding thereon, it would no doubt be a skirt

protector while it lasted, but, being minus the thick edge, it would not last long.

Cross-int. 15. Point out wherein it would differ from the Morrison skirt protector if it were sewn into a dress skirt so that it would hang between the lower edge of the skirt and ground or pavement, projecting slightly below the edge and braid or binding thereon, except that the Morrison protector is made of what is called enameled cloth has the cloth coated with vulcanized rubber?

Ans. Exhibit B differs from the Morrison protector in these respects, that if the thick edge was cut off, and it was sewed into a dress skirt in the manner I have just described, it would not fray out, as would the Morrison protector, because Exhibit B is cut bias, and cannot fray or ravel; and, being cut bias, it is more elastic, would conform more easily to the shape of a gored skirt; and having a black back of fine cambric, to wit, (A) lining, it would not present such a horrible appearance if sewed in and allowed to hang below the lower edge of the skirt, as would the Morrison skirt protector if sewed in the same way. The Morrison skirt protector being cut straight-grained, could not be applied to the lower part of a gored skirt even as a facing, because it is so thick and clumsy that it could not be made to fit. But the idea of using it for a skirt protector is simply absurd; it never was done—it never could be done.

Cross-int. 16. Do you know of any other distinctions? If so, state them all now.

Ans. Although the Morrison protector and Exhibit B are both water-proof materials, "Exhibit Morrison Protector" is unsuitable for skirt protectors because it is too heavy, and because enameled cloth does not wear well as a skirt protector, and could not be applied to a dress skirt as such, while Exhibit B was made especially for that purpose.

114 Cross-int. 17. Do you know of any other distinctions?

Ans. There may be others, but I think I have enumerated all I can at present.

Cross-int. 18. Is the bias cut essential to the skirt protector as you have patented it?

Ans. It is not absolutely necessary, although skirt protectors cut bias wear better and conform more easily to the lower part of a gored skirt.

Cross-int. 19. Will you point out that portion of your patent in which you describe cutting the enameled cloth bias as either the best way or any way of making your protector?

Ans. Yes, sir. All the models or exhibits sent by me to the Patent Office were cut bias.

Cross-int. 20. Then you knew at that time that it was important to cut them bias, did you?

Ans. Yes, particularly the first I sent, which were made of ordinary enameled cloth.

Cross-int. 21. Is any mention made of that bias cut in your specification? If so, point it out.

Ans. Mention of it may somewhere be found in the file-wrapper and contents. I don't think it is mentioned in the specification of the patent, but the models I sent were all cut bias.

Cross-int. 22. Suppose Exhibit B had its cloth part cut straight, and not cut bias, other things being just as they are, would that be substantially the skirt protector described in your patent, as you understand it?

Ans. Yes. Cutting a skirt protector bias makes it wear better and fit better in a gored skirt; still it is not absolutely essential.

Cross-int. 23. Isn't the material of which Exhibit B is made a piece of black muslin, coated with vulcanized rubber, commonly called India-rubber cloth or rubber cloth, to which the wearing strip is vulcanized on one edge?

Ans. Exhibit B is not made of muslin. That would be like defendants' claim to this article, entirely "too thin."

Cross-int. 24. Isn't it composed of square-woven cotton cloth dyed black, such as used for printing on, or for cotton shirtings before it is dyed?

115 Ans. It is composed of ⟨A⟩ lining, which is a cotton cloth dyed black. I never saw it used for "printing on." I know nothing whatever about shirts or shirtings.

Cross-int. 25. Does it differ from any other square-woven cotton cloth? If so, explain the difference.

Ans. It does differ from some other kinds of cotton cloth; there are many grades of this fabric. It is different from the coarse, unbleached cotton cloth which is shown on the cloth side of Defendants' "Exhibit Morrison Protector."

Cross-int. 26. Does it differ from that in any circumstance except that it has been dyed black and is finer; and, if so, what is it that constitutes the difference?

Ans. These two differences you have named are important; beside these, it has a much better finish.

Cross-int. 27. Do you mean that the cotton cloth in the one differs from the other in any circumstance except the fineness, taking them both before they were coated or dyed? If so, point out the difference of manufacture.

Ans. I had no means of comparing them before they were coated or dyed.

Cross-int. 28. Do you mean, by all this, to say that the cloth of Exhibit B is anything more than ordinary square-woven cotton cloth?

Ans. I do not doubt but that it is squar-ewoven. I have not called it lace, and that is the only fabric I have ever seen that was not square-woven.

Cross-int. 29. Isn't it ordinary cotton cloth, such as you would expect to find in any shop where cotton cloths are sold? If not, describe its peculiarities distinguishing it from ordinary cotton cloth of that fineness.

Ans. It is not ordinary cotton cloth. It is an article that is not for sale in any store in Boston; and I know of but one establishment in New York where it can be found.

Cross-int. 30. Wherein does it differ from ordinary cotton cloth of that fineness?

Ans. It has a pecular finish that renders it different from ordinary cotton cloth, and admirable for coating with India-rubber.

116 Cross-int. 31. Is that material described in your patent, so far as you know?

Ans. I suppose my patent gives me a right to use any fabric which I can render water-proof for the purpose set forth.

Cross-int. 32. Look now at Exhibit A, Day's Protector, and say whether it is composed of this peculiar cotton cloth, or whether it is cut bias, as Exhibit B is?

Ans. I used ⟨A⟩ lining because the rubber company that made my goods preferred it, it being, as they said, well finished and very firm, which two qualities made it much better to coat with India-rubber. I have also used umbrella cloth for the same purpose; and if I can find any other fabric that will suit my purpose as well as ⟨A⟩ lining or umbrella cloth, and is cheaper, I will use it, if I wish to. Day's protector is not cut bias, and it is not made of ⟨A⟩ lining. These people, knowing full well (I allude to Day & Sidenberg) that they had no right to this article, and that they would in all probability have a short time to use it, manufactured skirt protectors out of the very poorest and cheapest material they could find; thereby they have nearly ruined the skirt-protector business. This Exhibit A, Day Protector, is made of a poorly finished, coarse, cheap, poorly dyed cotton cloth. It is coated with a dull-finish enamel, called by some imitation India-rubber, but is much cheaper than India-rubber, and is nearly worthless as compared with that article. Although this Day protector, as I have already stated, is a very poor article, it is, nevertheless, a water-proof skirt protector, and has prevented the sales of hundreds of thousands of the Macdonald protector. Mr. Sidenberg, who manufactured them for Day, knew full well that I had not the capital to enable me to compete with him in selling skirt protectors; therefore he flooded the market with this cheap article known as the Day protector.

Cross-int. 33. If the Day protector is inferior to "Exhibit B," it is because, first, the cloth is enameled instead of being coated with vulcanized rubber; secondly, it is ordinary coarse cotton cloth, poorly dyed, instead of this peculiar material obtainable only in one place in New York; thirdly, the vulcanized rubber wearing edge is sewed fast to the enameled cloth, whereas in "Exhibit B" it is vulcanized fast to the India-rubber cloth; and, fourthly, Day's protector

117 is cut square, whereas "Exhibit B" is cut bias. Are there any other reasons than these for the difference and superiority of "Exhibit B"?

Ans. Exhibit B is conceded by all who have used the two article, to be in every way superior to Exhibit A. I have never said that the vulcanized rubber wearing-edge on Exhibit A is sewed fast to the enameled body of that protector; on the contrary, it is sewed

on so very slightly that it is sure to drop off before it has been worn three days. If the learned counsel for the defendants call this article Exhibit A "square," I suppose he would call an ordinary steel rail, such as our street railroads are made of, "square," even if that rail measured twelve or fifteen feet in length.

Cross-int. 34. Is there any difference between Day's protector and Exhibit B, except these, first, that Day's is made of enameled cloth, whereas Exhibit B is made of India-rubber coated cloth; second, the cloth in Day's is ordinary coarse cotton cloth, poorly dyed, whereas Exhibit B is made of a peculiar material, which you have already described; third, the vulcanized rubber wearing edge is sewed to the enameled cloth in Day's with more or less of stitches, whereas in Exhibit B the wearing vulcanized rubber edge is vulcanized fast to the strip of India-rubber cloth; and, fourth, the strip of enameled cloth in Day's protector is cut square, or at right angles to the filling, whereas in Exhibit B the strip is cut bias or diagonally to the filling?

[The complainant at this time, 2.05 o'clock p. m., says that the above question will require a very long answer, and, thereupon, a recess for lunch for one hour is taken, the defendants' counsel stating that he is ready to go on without intermission.]

Ans. Exhibit B is a water-proof skirt protector. Exhibit A is also a water-proof skirt protector, and, although inferior in many respects, is, nevertheless, for the same purpose and the same in substance.

Cross-int. 35. Is there any difference between them except those enumerated in the last question? If so, name it.

Ans. These are all I can think of at present.

Cross-int. 36. Is there any difference between Day's protector and Morrison's protector, except that Day's protector has a wearing
118 strip of vulcanized rubber stitched to the lower edge of the enameled cloth, whereas Morrison's has no such wearing edge, but presents a raw edge to the pavement? If so, name that other difference.

Ans. The two articles are different. The Exhibit A, Day protector, is a skirt protector, and nothing else. The strip of enameled cloth which the defendants call the Morrison protector is a strip of enameled cloth and in no sense a protector. This Exhibit A might project slightly below the lower edge of the dress skirt and not disfigure the dress. The so-called Morrison protector could not be applied as a skirt protector, because if allowed to project below the edge of the dress, as all skirt protectors should do in order to serve as a protection, the edge would ravel, the dirty white threads drag along, and, with the white back of the enameled cloth, present an objectionable and dirty appearance.

Cross-int. 37. Is there any difference between the Day protector with the wearing strip removed and the Morrison protector, considering them both as articles of manufacture to be sold over the counter, except that one seems to be black and the other a light brown color? If so, point out that difference.

Ans. It would take a wide stretch of the imagination to consider this article, Morrison protector, an article of manufacture, except as it appears in the full-width web of enameled cloth. My imagination is not strong enough to draw such a picture.

Cross-int. 38. Is your imagination strong enough to suppose "Exhibit Morrison Skirt Protector, J. A. S., Commissioner," to be as long as Exhibit A, which would require an addition of thirteen inches to its length?

Ans. I have no means of measuring either of them.

Cross-int. 39. Is your imagination strong enough to suppose them both of the same length, whatever it be, either by cutting one off or lengthening the other?

Ans. I don't know the length of either of them, and I have no means of measuring.

Cross-int. 40. Look at those two exhibits and say whether, if the India-rubber wearing strip were removed from Exhibit A, it would be at all different from Exhibit Morrison, except that one is a strip of black enameled cloth and the other a strip of brown enam-
119 eled cloth, both being to be used to attach to the lower edge of a dress to protect it from dirt and wear. If you say there is any other difference between them, point it out.

Ans. Rip off the grooved rubber edge from Complainant's Exhibit A, and it would still be different from "Exhibit Morrison Protector."

Cross-int. 41. In what respect would it differ?

Ans. The white back of "Exhibit Morrison Protector" renders it materially and substantially different from Exhibit A, inasmuch as Exhibit A could be allowed to project slightly below the lower edge of the skirt and braid, or binding thereon, and not disfigure the skirt, which the Morrison protector must of necessity do.

Cross-int. 42. Of what color must the cloth foundation of the enameled cloth be in order to be substantially the thing mentioned in your patent?

Ans. Not the color of this old Morrison protector.

Cross-int. 43. What color should it be to be the thing described in your patent?

Ans. Any color that I choose to make it.

Cross-int. 44. What was the color of the enameled cloth which you described in your patent?

Ans. My patent does not limit me to enameled cloth, nor to color.

Cross-int. 45. At the time you applied for your patent enameled cloth was made in varieties of colors, both face and foundation, was it not?

Ans. It was not; it was only made with a coarse white foundation similar to "Exhibit Morrison Protector."

Cross-int. 46. And that is the material described by you in your patent under the name of enameled cloth, isn't it?

Ans. I was compelled to make my models for the Patent Office out of enameled cloth having a white back, for there was no other water-proof material in the market at that time; but I did not let the white back show, nor the raw edge drag.

Cross-int. 47. In 1874, and for many years before it, wasn't black

India-rubber cloth for the purpose of men's and women's
120 water-proof garments and other uses a well-known article to you as a dress-maker familiar with water-proof materials?

Ans. It was not; and in 1873, when I applied for my patent, there was no water-proof material in the market except enameled cloth having a white back. I, being a dress-maker, knew very well what kind of water-proof fabrics were in the market at that time. I admit that India-rubber coats were made before that time, but the cloth out of which they were made was not for sale by the yard. These coats were made at India-rubber factories and their seams vulcanized together before the cloth was vulcanized, otherwise the coat could not be put together. Women had not at that time began to wear gossamer India-rubber cloaks such as they now wear. These articles I think were never made in this country till 1875. I think the first one I ever saw was in 1875; that was imported. There was no black India-rubber cloth in the market in 1873, and I think the India-rubber coats that were on sale at that time were imported. If there had been any India-rubber cloth in the market in 1873 I would have made my model out of it, and not employed common enameled cloth with a white back, which I had to conceal.

Cross-int. 48. Then the words "enameled cloth" in your patent describe a white-back enameled cloth, and nothing else, isn't that so?

Ans. "Or other water-proof material."

Cross-int. 49. You used the words "enameled cloth" in your patent, and also the words "other water-proof material." Did you know of any other enameled cloth except that which had a white back, and was not that sort of enameled cloth the kind referred to by the words "enameled cloth" in your description?

Ans. I used the words "enameled cloth" because, as I have said many times, I was obliged to use enameled cloth to illustrate the thing I wished to patent. I used the words "or other water-proof material" to secure to myself the right and privilege of making this article out of any water-proof material I chose.

Cross-int. 50. The question is, whether the words "enameled cloth" in your specification describe anything then known to you except enameled cloth with a white back. If they describe anything else, what was it, at that time known to you?

121 Ans. I will answer that to-morrow.

[Counsel for defendants requests the complainant to proceed with her testimony, and offers to continue now or to take a recess and go on this evening, if it will accommodate her, to complete her testimony within her time.

The examiner certifies that this offer is made at ten minutes before 5 p. m.

The complainant states that the learned counsel for defendants may not live long if he insists upon taking evidence by gaslight. She would hereby kindly warn him that John C. Heenan, Tom Sayers, and many others of the great "uns" died young. As the learned counsel has followed their line of action through life, it may

be his sad fate to follow them in death. She therefore says "Beware!!!"]

[Adjourned to Tuesday, Dec. 23, 1879, at 10 o'clock a. m.]

[Counsel for the defendants offers to come at any hour earlier that will accommodate the complainant.]

BOSTON, *Dec.* 23, 1879.

[At 10 o'clock a. m. Edward N. Dickerson, Esq., of counsel for defendants, was present, but the examiner had received from the complainant a note saying that it would be impossible for her to go on with evidence before 12 o'clock, and thereupon the taking of testimony was adjourned till 12 o'clock.

At 12.23 p. m. the complainant arrived, and the defendants were represented by Edward N. Dickerson, Esq., and Jabez S. Holmes, Esq.]

Cross-examination by EDWARD N. DICKERSON, Esq., continued:

[Cross-int. 50, propounded before the adjournment, Dec. 22, 1879, is now answered.]

Ans. The words "enameled cloth" in my specification refer to models made of that material, which I had sent to the Patent Office to illustrate the article I wished to patent. I have already stated that at the time I made my application for a patent there was no water-proof material in the market but this ordinary enameled cloth with a white back. As this was entirely unfit for skirt protectors, it
122 was my intention at that time to have suitable material made out of which I could manufacture skirt protectors, provided I obtained a patent for the same. In August or September, 1873, when my prospects for obtaining a patent were good, I sent one yard of alpaca to the Taunton Oil Cloth Company with instructions for them to water-proof it. Out of that one yard I made samples of skirt protectors, which I sent to the Patent Office in a letter, dated Oct. 2, 1873, which letter will be found in the file-wrapper and contents put in evidence by the defendants. If I did not know of any water-proof material other than ordinary enameled cloth, with a white back, being in the market at the time, it was because there was no other water-proof material in the market at that time, for I kept myself well informed on such matters. I knew, of course, that if I obtained a patent for this article it could be an easy matter to have suitable material made.

Cross-int. 51. Did you or did you not, when you swore to the specification of your patent, know of any enameled cloth except that having a white back?

Ans. When I swore to my specification to my patent in May, 1873, I knew of no enameled cloth being for sale in the market except the ordinary enameled cloth with a white back.

Cross-int. 52. [Question repeated.]

Ans. Well, I have answered the question. I did not.

Cross-int. 53. You have said that the raw edge of enameled cloth differed in some way from the raw edge of what you called japanned cloth. Did you mean to say that that difference was such as to make one of those materials fit for a skirt protector, while the other was not?

Ans. Certainly I did, and I should think a little boy of five years old could detect and point out the difference between Macdonald Exhibit E, which is japanned alpaca, "cut bias," and made up with raw edges, and Defendants' "Exhibit Morrison Protector."

Cross-int. 54. And you knew in October, 1873, that a protector could not be made out of enameled cloth with a white back, but that it could be made out of japanned alpaca, cut bias, and presenting its raw edge to the ground. Is not that so?

123 Ans. Oh, dear! how very dull some men are! I knew it before that time.

Cross-int. 55. How long before that time did you know it?

Ans. Several years.

Cross-int. 56. Suppose in Macdonald Exhibit E the plaiting were removed, leaving the strip of japanned alpaca plain, would that be a dress protector, substantially like the thing you invented, as you understand it?

Ans. If sewed into the lower edge of the dress, so as to hang between the edge of the skirt and the braid or binding thereon and the floor or pavement, it would undoubtedly protect the skirt to some extent, and thereby be the same in substance.

Cross-int. 57. And if Morrison's skirt protector were sewed into the lower edge of the dress, so as to hang between the edge of the skirt and the braid or binding thereon and the floor or pavement, just as you suppose the plain strip of japanned alpaca to be fastened to the dress, it would not be a protector, substantially such as you invented; is not that what you mean to swear to?

Ans. I mean to swear to the truth, as I have done heretofore. Morrison protector, or this piece of enameled cloth called Morrison protector, never was, and never can be, applied to a dress in that way. The defendants' witnesses might as well have sworn that they had seen a horse-blanket attached in like manner to the lower edge of a lady's skirt.

Cross-int. 58. [Question repeated.]

Ans. I cannot imagine such an absurd thing being done.

Cross-int. 59. [Question repeated.]

Ans. I have answered that question to the best of my ability.

Cross-int. 60. Have you answered it that it would or that it would not be substantially the thing you invented?

Ans. I have said that I couldn't imagine such a thing. That is the only answer that I have.

Cross-int. 61. I have now cut off about four inches of Morrison protector, and I pin it on to Macdonald's Exhibit D, just at the end of the India-rubber protector which you have sewed or stitched on to the lower edge of that skirt lining, and I suppose it to have been sewed instead of pinned, as I have no needle and

124 thread here, and I have marked it "Morrison's Skirt Protector, attached to Macdonald Exhibit D." Now, I ask you

to look at that arrangement, and to say whether you understand it, supposing the enameled protector to be sewed to the lining, as the India-rubber one is?

Ans. I do understand it.

Cross-int. 62. Now, suppose that to be sewed fast and to be extended around the back part of the skirt just as far as the India-rubber protector is, taking the place of the India-rubber protector removed for the purpose, and to be sewed fast at its ends, just as the India-rubber protector is, would that be a skirt protector substantially like the one you claim to have invented?

Ans. Why, I should think you could see for yourself that it would be a piece of ordinary enameled cloth, cut straight, presenting a white back and raw edge hanging below the edge of the dress skirt, such a thing as no person of sense would think of using in that way.

Cross-int. 63. [Question repeated.]

Ans. The thing is so impracticable and absurd that I cannot imagine how such a thing could be attempted.

Cross-int. 64. [Question repeated.]

Ans. This is the only answer I have to make to this question.

Cross-int. 65. In your direct examination you swore as follows: "I refer once more to Defendants' Exhibit 'Morrison's Protector,' and firmly state it is not a skirt protector, and that it was never sold for a skirt protector, and that it could not be possibly used as a skirt protector." Now, suppose it were applied as I have stated in the last question, do you still adhere to what you swore to, that it could not possibly be used as a skirt protector?

Ans. It is not a skirt protector.

Cross-int. 66. Now, suppose in place of being attached in a plain strip, like "Morrison Exhibit," the enameled cloth were fluted or plaited like Fig. 1 of your patent, would it then be any less impracticable and absurd, or any more a skirt protector than when plain?

Ans. This piece of enameled cloth marked "Morrison Skirt
125 Protector" could not be made into a model like that illustrated in Fig. 1 Macdonald patent.

Cross-int. 67. [Question repeated.]

Ans. If this piece of enameled cloth, marked "Morrison Protector," were plaited or fluted, it would not be like Fig. 1 Macdonald patent.

Cross-int. 68. [Question repeated.]

Ans. I have answered the question; I have no further answer to make to that.

Cross-int. 69. Then you mean to swear, do you, that enameled cloth, such as Morrison's Exhibit, could not be plaited or fluted in the manner shown in Fig. 1 of your patent?

Ans. Yes; but it could be made into articles like articles 1, 3, and 4, on the right-hand side of Defendants' Exhibit "Blackwell's Island" or Protector Samples, which have no characteristics of the first model I sent to the Patent Office, and which is illustrated in No. 1 Macdonald patent.

Cross-int. 70. Now that you have sworn that it is impossible to make a dress protector substantially like the thing you invented and patented out of enameled cloth, and also that in 1873 there was no other water-proof material in the market except enameled cloth with white backs, will you inform the court when you made your first dress protector, out of what material it was made, and where it was made?

Ans. I have said that I used enameled cloth to experiment with, and that I made my model for the Patent Office out of enameled cloth for the want of a more suitable material. I have also said that there was no other water-proof material in the market in 1873 but this ordinary enameled cloth having a white back. But in the model I made for the Patent Office, and in all those I made to experiment with, I never allowed the raw edge to drag or the white back or foundation to show below the edge of the dress skirt. The manner in which I used this enameled cloth in my experiments, and in the models I sent to the Patent Office, I illustrated and alluded to as Complainant's Exhibit 22, in the original case of Macdonald against Blackmer and others, page 135, interrogatory 18.

126 Cross-int. 71. [Question repeated.]

Ans. The learned counsel inquires particularly when I made this first skirt—when I made my first skirt protector. Is it possible that he has not read the decision of Judge Lowell, of the Massachusetts circuit; of Judge Blatchford, of the New York circuit, or does he want to insert another advertisement in the New York Herald to this effect: "Any lady having used water-proof material for the purpose of protecting the lower edge of dress skirts previous to 1861 will be suitably rewarded by communicating with William Weigle, 49 Mercer St., New York"? In answer to his question when and where, my answer is, in 1861, in Lowell.

Cross-int. 72. Out of what material was it made and in what form was it and how was it attached to the dress?

Ans. It was made of enameled cloth, for the want of a better material; it was in the form of a skirt protector; it was attached to the dress skirt by sewing.

Cross-int. 73. Was it plain, or fluted or plaited?

Ans. The first one I ever made was plain, and in the original case of Macdonald *v.* Blackmer was illustrated in Complainant's Exhibit No. 22.

Cross-int. 74. How was it sewed to the dress?

Ans. With a needle and thread, skilfully used by complainant.

Cross-int. 75. Was it sewed to the dress at the top of the strip of enameled cloth, or at the top and bottom both?

Ans. At the top only.

Cross-int. 76. You were examined as a witness in your own behalf in the Patent Office in the interference between you and Chase and others in 1874, were you not?

[At this time, 2.47 p. m., the complainant asks an adjournment, which the examiner also desires, and to which the counsel for de-

fendants object. Complainant fixes the hour for proceeding at 4 o'clock p. m.]

Ans. to Cross-int. 76. I was examined as a witness in my own behalf in the interference case of Macdonald *v.* Chase in the year 1874.

Cross-int. 77. You also took the testimony of Mary B. Arlin and Joseph F. Bedell in your behalf in that interference, and filed
127 their testimony in the Patent Office in support of your side of the interference, did you not?

Ans. The two persons named gave evidence in my behalf in that interference trial, and their evidence was filed in the Patent Office.

Cross-int. 78. Did you know then as much about what you had done in making your invention as you do now?

Ans. Yes; but I didn't know so well what to call the thing I had invented; neither did my witness, Mary B. Arlen, because in her evidence she called the article which she saw me wear, and which was a skirt protector, a skirt "facing." Now, I knew at that time that the article I had invented was not a facing; that it was entirely distinct from a facing, and that it was to be sewed into a skirt over the facing; that it was entirely different from a facing, and that it served an entirely different purpose on a dress from a facing; yet when I drew my papers for the Patent Office I knew no better than to call it a skirt protector or facing, and, as the record will show, afterwards disclaimed the word "facing." I might have said, and ought to have said, I claimed a water-proof skirt protector, which would have covered everything and saved much trouble and annoyance; but I did not know enough at that time to call those things by their right names, although I knew full well they were different and used for different purposes; and I dare say that that was the case with my witness, Mary B. Arlen, who testified in my behalf and spoke of this thing as a skirt facing.

Cross-int. 79. Haven't you read a copy of a part of these examinations in the interference case since the adjournment this morning?

Ans. Yes.

Cross-int. 80. Did you read a copy of your own deposition in that interference?

Ans. Yes.

Cross-int. 81. Wasn't the controversy, or a part of it, between you and Herbert Chase founded upon the fact that his plaited or fluted protector was made of India-rubber cloth, while yours was made of enameled cloth, which he denied was a water-proof ma-
128 terial, while you affirmed that it was, and was the proper material for a skirt protector?

Ans. No.

Cross-int. 82. Wasn't Herbert Chase's fluted protector made of India-rubber cloth, while yours was made of enameled cloth?

Ans. Mr. Herbert Chase, of New York, who was in interference with me, did not file an application for a patent till October 16, 1873, more than five months after my application for a patent had been filed in the United States Patent Office, and several days after I had sent exhibits, like this Exhibit E, of japanned alpaca, which

was equivalent, so far as being water-proof, to India-rubber cloth. The controversy was not founded upon the fact that his plaited or fluted protector was made of India-rubber cloth; and the learned counsel for the defendants has stated the matter falsely when he says that I ever claimed or hinted that enameled cloth was better for skirt protectors than India-rubber cloth.

Cross-int. 83. [Question repeated.]

Ans. I think Herbert Chase stated in his evidence, taken at that time for the Patent Office, that he did not use water-proof material of any kind until December, 1873, or January or February, 1874; but, as I have not read his testimony since that time, I am not positive as to these dates.

Cross-int. 84. Wasn't the water-proof protector filed by Herbert Chase with his application, and specified by him in his preliminary statement, made of India-rubber cloth, while yours was made of enameled cloth?

[Objected to, because that is a matter of record, and the learned counsel holds the record and cross-examines me from it, while he has refused to allow me to look at it.]

Ans. It makes very little difference to me whether his first models were made of India-rubber cloth or not (although I don't believe they were), because his application for a patent was not filed in the Patent Office till the 16th day of October, 1873, and some weeks after I had sent to the Patent Office a sample of skirt protector like Exhibit F, which, so far as being water-proof, was equivalent to any other kind of water-proof material.

129 [Cross-examination of complainant suspended by consent, in order to finish deposition of James G. Bowden.]

Cross-examination of the complainant continued by JABEZ S. HOLMES, Esq., counsel for defendants:

Cross-int. 85. Please answer the question or decline to answer it.

[Complainant says: I must defer answering that question until I can go home and read Herbert Chase's evidence.

Complainant further states that the defendants appear to have a record of the interference trial between herself and Chase, from which they cross-examine her, and which they no doubt intend to put in evidence, and which they refuse to allow her to examine.]

[Adjourned at 5.40 p. m. for one hour.]

6.40 p. m.

Ans. to Cross-int. 85. I do not know what kind of skirt protectors were filed in the Patent Office by Mr. Herbert Chase with his application, nor specified by him in his preliminary statement. I examined some of his specimens in the Patent Office, which were filed, I think, in the early part of 1874, and they were not made of India-rubber; they were made of wiggan, bound on the lower edge with enameled cloth, similar to Complainant's Exhibit A, which is a very good imitation of India-rubber cloth. I called at Chase's manu-

factory, on Broadway, New York, on the 25th day of August, 1874, and examined his goods. I saw no goods made of India-rubber cloth, but saw several styles of this dull-finish enameled cloth, which is a very good imitation of India-rubber cloth. In answer to the 82d interrogatory, I will say that I have before me a printed copy of the evidence taken in the interference case, and will quote therefrom the question asked by Mr. Herbert Chase and the answer given by me, which the defendants' counsel must have alluded to in the 82d interrogatory:

"Cross-int. 9. Do you not know that enameled cloth is not strictly water-proof?

"Ans. I know that it is while it remains whole."

130 Cross-int. 86. Look at the document now shown you, being certified copy from United States Patent Office of preliminary statements of Mr. Herbert Chase and John E. Frock, and depositions of Helen M. Macdonald, Mary B. Arlen, and Joseph F. Bedell, etc., and say whether or not you testified in that interference, as in that document appears.

Ans. I did.

Cross-int. 87. Look at the depositions of Mary B. Arlen and Joseph F. Bedell in that document, and see if they testified as therein appears.

Ans. They did.

[The document last above named is offered in evidence by the defendants' counsel, and is marked "Defendants' Exhibit Interference Record, E. B. Hagar, Special Examiner.]

Cross-int. 88. This document contains also preliminary statements of Mr. Herbert Chase and John E. Frock in that interference, does it not?

Ans. It appears to.

[Redirect examination waived.]

HELEN M. MACDONALD.

Attest: E. B. HAGAR,
Special Examiner.

Deposition of James G. Bowden, Resumed.

[Continued from page 94.]

Redirect examination of JAMES G. BOWDEN by Miss H. M. MACDONALD, the complainant:

Int. 72. In answer to the 17th cross-interrogatory you have said: "I should not think that a dress protector that did not project below and protect the braid would be a sufficient protector. Neither would an article with a raw edge, in my estimation." What did you mean by that last statement?

Ans. I mean to say that, in my estimation, a skirt protector of enameled cloth would not be suitable for a protector; also to say

that I think that any material should have a heavy edge at the present day to be salable.

Int. 73. Do you think Defendants' "Exhibit Morrison Pro-
131 tector," which has a white-back raw edge, suitable for a skirt protector, or do you think it could be used as such?

Ans. I do not think it is suitable, and never saw it used. I do not think it can be. I am very sure it would not be salable as such.

JAMES G. BOWDEN.

DEC. 23, 1879.

Then the above-named James G. Bowden subscribed the foregoing deposition, and made oath that his entire deposition, both that given before Geo. A. Morse, Esq., and that given before me, is true.

Before me—

EUGENE B. HAGAR,
Special Examiner.

Deposition of William W. Churchill.

Direct examination by complainant:

BOSTON, *Dec.* 20, 1879.

Int. 1. You may state your name, age, residence, and occupation.

Ans. William W. Churchill; age, 60; residence, 54 Chester Square, Boston; at present have no occupation.

Int. 2. Were you formerly in the dry goods business; if so, for how many years were you in that business, and where located?

Ans. I was formerly in the dry goods business twenty-three years. I commenced on Winter street; then I bought out the corner store on Washington street, connecting the whole together, and in either one or both of those places was about twenty-one years. Then I moved on to Washington street. I can't exactly give you the year; was there a couple of years, perhaps.

Int. 3. While you carried on business on the corner of Winter and Washington streets did you manufacture and sell enameled-cloth skirt facings; if so, about what time did you begin the manufacture and sale of those articles, as near as you can remember?

Ans. To the first question, if I manufactured and sold, I
132 say yes. Now, to the second one, it's impossible for me to say when I first began to manufacture enameled-cloth dress facings.

Int. 4. Did you make other kinds of skirt facings before you began to make facings of enameled cloth; and, if so, of what material did you make them?

Ans. I used hair cloth for the purpose, just as I used enameled cloth afterwards.

Int. 5. How did you manufacture these hair cloth facings?

Ans. The hair cloth came in rolls; I can't remember the number of yards, I don't suppose that's important; perhaps twenty inches wide. We had the whole rolls cut through into pieces, well, perhaps four or five inches wide; we then had the pieces of cambric

cut into strips, it may be twice as wide as the hair cloth, and had one edge of the hair cloth sewed to one edge of the cambric. That's the whole of that process, I believe.

Int. 6. Did you afterwards manufacture dress facings of enameled cloth, substantially like the facing which is illustrated in Macdonald Exhibit C now shown you?

Ans. Yes.

Int. 7. Did you manufacture those goods in large quantities?

Ans. Yes.

Int. 8. Did you have in your employ at that time one James A. Mackee?

Ans. I don't remember his initials; I had a Mr. Mackee in my employ; he is now, or was a short time ago, of the firm of Mackee, Edwards & Co.; I think it is in Providence.

Int. 9. Is he the same Mackee who afterwards claimed a patent for sewing together the enameled cloth and cambric in the so-called Mackee patent combination dress facing, illustrated in Macdonald Exhibit C?

Ans. Yes.

Int. 10. Please tell us, Mr. Churchill, how you first happened to commence the manufacture of skirt facings by combining cambric to the top of a straight piece of hair cloth.

Ans. We first sold the hair cloth and the cambric by the yard, without cutting it in narrow pieces; we then cut the cambric and the hair cloth into pieces, such as I have described, and sold
133 them by the yard. I had over my store two dress-makers—Hall and Buttland. I went to them one day and said, "Would it be a convenience to you to have these sewed together?" The reply was, "A great convenience." I then commenced to have them sewed together, first cambric and hair cloth, afterwards enameled cloth and cambric.

Int. 11. About what year did you commence to make these hair cloth facings?

Ans. I can't answer with any positiveness.

Int. 12. Please state as near as you can.

Ans. It was before I commenced to join the cambric and enameled cloth, and I commenced that a considerable time before 1865.

Int. 13. Did you sell these enameled cloth facings in large quantities?

Ans. Yes, very large; sold them at wholesale and retail.

Int. 14. Did you sell them for skirt facings, and were they known to the trade by that name?

Ans. Yes.

Int. 15. Were these articles ever called skirt protectors—I allude to this "Macdonald Exhibit C"—or were they known to the trade as such?

[Objected to by defendants' counsel as incompetent and immaterial.]

Ans. I never heard them called skirt protectors, and I never heard that they were known to the trade as such. At a certain time, I

think, I sold more than anybody; we regularly billed them as dress facings.

Cross-examination by JABEZ S. HOLMES, Esq.:

Cross-int. 16. This combination of enameled cloth and cambric was sold in your store by the yard both at wholesale and retail, was it not?

Ans. Yes, it was.

Cross-int. 17. How wide, as nearly as you remember, was the cambric, and how wide was the enameled cloth?

134 Ans. I should say that the enameled cloth was four inches—I am guessing, of course—and the cambric seven or eight. I think it was considerably wider than the enameled cloth.

WILLIAM W. CHURCHILL.

Attest: E. B. HAGAR,
Special Examiner.

It is agreed by the complainant and the defendants' counsel that any part of the record in the case of Macdonald *v.* Blackmer and others, in the United States circuit court for the district of Massachusetts, may be referred to, either in evidence or in argument, by either party in this case.

Attest: E. B. HAGAR,
Special Examiner.

MACDONALD EXHIBIT G.—E. B. H., *Sp'l Ex'r.*

TAUNTON, *Oct. 27th*, 1873.

Miss Helen M. Macdonald to Taunton Oil Cloth Co., Dr.

For jappan-ing 4 p's, 50 yards alpaca, .12 ..... $6 00

Cash.

Received pay.

TAUNTON OIL CLOTH CO.,
T. NEWBURY, *Treas.*,
By W.

Bal., p'r Express.

135 DEFENDANTS' EXHIBIT INTERFERENCE RECORD.—E. B. H., *Special Examiner.*

Circuit Court of the United States, District of Massachusetts. In Equity.

HELEN M. MACDONALD
v.
JOHN SHEPARD *et al.* } No. 775.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the files of

this office of the preliminary statements of Herbert Chase and John E. Frock, and of the depositions of Helen M. Macdonald, Mary B. Arlen, and Joseph F. Bedell, together with the notices of taking such depositions, filed in the matter of the interference between Chase, Gallup, Hutton, and Macdonald, for skirt protectors.

In testimony whereof I, W. H. Doolittle, Acting Commissioner o Patents, have caused the seal of the Patent Office to be hereunto affixed, this twelfth day of December, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

136 In the Matter of Interference: M. H. CHASE, W. H. GALLUP, I. L. HUTTON, H. M. MACDONALD.

Skirt Protectors.

Preliminary statement of M. H. Chase, under rule 53.

CITY AND STATE OF NEW YORK:

M. Herbert Chase, being duly sworn, deposes and says: That in the month of November, 1872, he conceived the idea of using a plaited strip of India-rubber as a skirt protector; that he thought that the said material would be too expensive for the market in the condition it then was.

That in April, 1873, about the tenth of that month, he mentioned his invention to several parties, amongst whom he now recollects John W. Schoales and Miss T. Allen, describing the same to them, and he made a sample, using water-proof cloth instead of rubber fabric, to show the device, as he did not then have rubber cloth, but mentioned the same.

In the commencement of September, 1873, deponent arranged for the manufacture of the goods in India-rubber, and had them made and put into the market in a form corresponding to the model with his application for a patent.

M. HERBERT CHASE.

Subscribed and sworn to before me, this 13th November, 1873.

[SEAL.] CHAS. H. SMITH,
Notary Public.

In the Matter of the Application of JOHN E. FROCK, for Patent for Improvement in Skirt Protectors, Filed 13th November, 1873. In Interference.

Preliminary statement of John E. Frock.

Deponent conceived the invention of a fluted or plaited water-proof border for skirts in July or August, 1873, and had re-
137 duced the invention to practical shape in the early part of September, 1873.

JOHN E. FROCK.

Subscribed and sworn to this twenty-fourth day of November, A. D. 1873.

[SEAL.] WM. A STEEL,
Notary Public.

I, HELEN M. MACDONALD, of Lowell, in the county of Middlesex and Commonwealth of Massachusetts, on oath do depose and say, in answer to the interrogatories proposed by GEORGE J. CARNEY, as follows, viz:

Int. 1. What is your present occupation?
Ans. Dress-making.
Int. 2. How many years have you been so engaged?
Ans. I commenced the business in 1861.
Int. 3. For your own account?
Ans. No.
Int. 4. In what year did you first commence business for yourself?
Ans. In 1868.
Int. 5. In what place did you commence business?
Ans. In Boston.
Int. 6. Have you a pending application for a patent upon a certain so-called dress protector?
Ans. I have.
Int. 7. State, if you please, so far as possible, the full particulars relating to the said dress protector, the time at which you first thought of the same, the time at which you first used it, and such further particulars as may occur to you at this time, refreshing your memory, if there is need so to do, in relation thereto with any records, fabrics, or other proper evidences.
Ans. I had first thought of this improvement many years ago.

[Answer so far as given objected to by M. Herbert Chase as indefinite.]

138 Ans. resumed. Between the month of December, 1861, and the month of January, 1865, I did affix to the skirts of four dresses a water-proofed facing or protector. I had worn it continually from that time until 1868. Mrs. Mary B. Arlen has seen me wear such a dress, protected with a water-proofed facing or protector. Joseph F. Bedell, of Linneus, Maine, has seen a dress so protected, and he heard me explain it to his mother, and he remembers distinctly of seeing the material and the dress. I adopted the fashion of short dresses in 1865; therefore a protector was no longer needed nor thought much of till November, 1872, when I lengthened the skirts of dresses and began again to think of protectors and to apply for a patent, which application was made in due form, was filed in Washington the tenth day of May, 1873, and is now pending.

From the time I first put on a long dress, which was in the year 1854, I had thought of applying something to protect the lower edge of said dress, of the first long dress I ever wore.

Cross-interrogatories proposed by M. HERBERT CHASE:

Cross-int. 1. How long a time between the months of December, 1861, and January, 1865, did you wear this facing on four dresses?

Ans. I think I wore it all the time.

Cross-int. 2. Do you mean to say that you wore it all the time on the same dresses?

Ans. I wore it while these dresses lasted. I may have had other dresses with the same protector applied.

Cross-int. 3. Was that until the year 1865?

Ans. It was.

Cross-int. 4. Did you then neglect or drop the wearing of the same; and, if so, why?

Ans. I did, because a protector is not needed on a short dress.

Cross-int. 5. What, then, becomes of your statement that you wore it continuously until 1868?

Ans. I say that short dresses came in fashion in 1867; I mean I first adopted them. I cannot tell the time exactly, because I had short and long dresses at the same time.

Cross-int. 6. Why was a dress protector not needed between the years of 1865 and 1872?

139 Ans. I presume it was, because the dresses were short. I am speaking of my own dresses.

Cross-int. 7. Where did you get the enameled cloth?

Ans. I have bought it at various places.

Cross-int. 8. Then enameled cloth was what you used?

Ans. Yes, sir.

Cross-int. 9. Do you not know that enameled cloth is not strictly water-proof?

Ans. I know that it is while it remains whole.

Cross-int. 10. What do you mean by its remaining whole?

Ans. I mean until it is worn or broken or damaged in some way.

Cross-int. 11. How did you put the cloth on? Explain generally.

Ans. I sewed it on.

Cross-int. 12. To what part of the dress?

Ans. To the lower edge.

Cross-int. 13. As a binding, do you mean?

Ans. No.

Cross-int. 14. As a lining, do you mean?

Ans. As a protector.

Cross-int. 15. What do you mean by a protector?

Ans. I mean any water-proof fabric or material that will protect a dress or dress material from wearing or moisture.

Cross-int. 16. Explain how you cut this enameled cloth to apply it to the dress.

Ans. With a pair of shears.

Cross-int. 17. Did you cut in strips?

Ans. I did.

Cross-int. 18. How wide were the strips?

Ans. I varied the width as I happened to want them.

Cross-int. 19. Will you give the width of any one strip or about?

Ans. That depended altogether upon the length of the skirt of the dress.

Cross-int. 20. Did you then stitch them on to conform to the material?

140 Ans. I made them fit the bottom of the dress.

Cross-int. 21. Did you use the enameled cloth in a plain form?

Ans. I did.

Cross-int. 22. What did you do in November, 1872, towards applying for a patent?

Ans. I think I tried experiments with enameled cloth, with a view of obtaining a patent.

Cross-int. 23. Did you take any other steps towards applying for a patent?

Ans. I do not think any person ever took steps towards applying for a patent before they made models and tried them. I did that with the intention of making application for a patent.

Cross-int. 24. Did you apply in November, 1872, for a patent?

Ans. No.

Cross-int. 25. When did you first apply for a patent?

Ans. My application was filed May 10, 1873.

Cross-int. 26. When did you sign your papers for application for a patent?

Ans. I think I first showed it to Mr. Carney in April of the same year—that is, April, 1873.

Cross-int. 27. Why did you delay making an application for the patent for so long a time as elapsed between the years 1861 and 1873?

Ans. In the year 1861 I had no business experience, therefore could not be expected to think of applying for a patent.

Cross-int. 28. What is the date you wish to name in which you had had business experience?

Ans. I decline to answer.

[Answer objected to by M. Herbert Chase.]

Cross-int. 29. Why did you not apply for a patent in 1868?

Ans. It was not needed, and I presume not thought of by any person in that year.

Cross-int. 30. Why not?

Ans. I decline to answer.

[Objected to by M. Herbert Chase.]

Cross-int. 31. From 1865 to 1872, how many different times had you thought of this dress protector?

141 Ans. I decline to answer.

[Objected to by M. Herbert Chase.]

Cross-int. 32. Did you at any time between these years, 1865 and 1872, think of applying for a patent?

Ans. I really do not remember.

Cross-int. 33. Do you not know that in the years 1864 and 1865

it was common to sell enameled cloth as a lining for the lower edge of a dress?

Ans. I knew it was sold for any purpose I chose to apply it. I could have bought it for any purpose I chose to apply it.

Cross-int. 34. Do you not know that it was worn as a lining for the bottom of a dress about that time?

Ans. I know people were using water-proof facings. I used it myself.

Cross-int. 35. Did you see any such facings, and of what were they made?

Ans. I decline to answer.

[Objected to by M. Herbert Chase.]

Cross-int. 36. Can you name some of the people who were using water-proof facing about 1864 and 1865?

Ans. I cannot.

Cross-int. 37. What was this water-proof facing made of, that you know people were using about that time?

Ans. Mostly enameled cloth, I think.

Cross-int. 38. Was it used in plain form?

Ans. It was by me.

Cross-int. 39. Was it used in the same form by these people you speak of?

Ans. I do not know.

[General objections entered by M. Herbert Chase, first, to the whole testimony, on account of its contradictory character as to the reasons which have governed Miss Macdonald in not applying for the patent at an earlier date, and also as to contradiction of dates; second, to the entire testimony in relation to the use of plain enameled cloth, on the ground that there was nothing new in the use of said enameled cloth as a skirt protector, the same being described in letters patent 46218, granted Feb. 7, 1865.]

142 Redirect examination by G. J. CARNEY:

Int. 1. State, if you please, the time when the dress facing of enameled cloth was removed by you from the dress or dresses which you say in answer to number seven were made between the years 1861 and 1865.

Ans. I removed the last one three years ago last August.

Int. 2. That is to say, you had in use and in your possession for more than eight years a dress, the skirt protected by enameled cloth. Is that the fact?

Ans. It is.

Int. 3. Do you wish to change any of your replies to any of the foregoing direct or redirect interrogatories?

Ans. I do.

Int. 4. Please do so.

Ans. Instead of wearing the dresses continuously, I had them in my possession continuously.

Int. 5. I wish to know, Miss Macdonald, if you wish to amend or

change any of your answers given to Mr. Chase's or my own interrogatories?

Ans. I wish to say that those I decline to answer were because I lacked the information.

[Answer objected to by M. H. Chase, because the information which she states she lacked she previously stated to have had.]

Int. 6. Will you submit to be attached to this deposition samples of your enameled cloth in the plain and as manufactured; also a sample of dress material, if you have it, to which, prior to 1865, you had affixed a water-proofed enameled cloth as a dress protector?

Ans. I will.

[Submitted after close of deposition and marked Exhibits "A," "B," "C," John Davis, Magistrate.]

HELEN MARIE MACDONALD.

143 I, MARY B. ARLEN, on oath depose and say, in answer to the following interrogatories and cross-interrogatories, as follows, viz:

Interrogatories proposed to MARY B. ARLEN by GEO. J. CARNEY:

Int. 1. In what year did you see a dress skirt the property of Helen M. Macdonald, which had upon it a water-proof facing affixed to the lower edge of the skirt as a protector, said facing being composed of enameled cloth?

Ans. In 1863.

Cross-interrogatories proposed by M. HERBERT CHASE:

Cross-int. 1. Will you describe enameled cloth as near as you can?

Ans. One side of it seemed to be glazed like a soft oil-cloth. I supposed it to be water-proof. I never saw it glazed on both sides. I know that one side will absorb water.

MARY B. ARLEN.

I, JOSEPH F. BEDELL, on oath depose and say, in answer to the interrogatories and cross-interrogatories, as follows, viz:

Interrogatories proposed by GEORGE J. CARNEY:

Int. 1. In what year did you see a dress skirt, the property of Helen M. Macdonald, which had upon it a water-proofed facing affixed to the lower edge of the skirt as a protector, said facing being composed of enameled cloth?

Ans. It was in the month of March, in the year 1867.

Cross-interrogatories proposed by M. HERBERT CHASE:

Cross-int. 1. Was she wearing the dress?

Ans. She was. I did not at that time know what enameled cloth was. I do not think it protruded below the bottom of the dress. I do not know whether it did or not.

JOSEPH F. BEDELL.

144 COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *ss:*

On the twenty-fifth day of March, A. D. 1874, the aforesaid deponents, to wit, Helen M. Macdonald, Mary B. Arlen, and Joseph F. Bedell, personally appeared before me, the subscriber, at the office of said Helen M. Macdonald, in the Savings Bank Building, in the city of Lowell, in said State of Massachusetts, and they, being first cautioned and sworn to speak the truth, the whole truth, and nothing but the truth relating to the cause for which this deposition was taken, gave the foregoing depositions, said depositions being taken in the office of George J. Carney, in said Savings Bank Building, said hearing being adjourned from the office of said Helen M. Macdonald to the office of said George J. Carney for the purpose of taking said depositions by the mutual consent of all parties present who were taking and interested in the same, to wit, with the consent of said Helen M. Macdonald and M. Herbert Chase, parties in interest, and said depositions were by me reduced to writing in the presence of said witnesses, and were carefully read over by me to said witnesses severally, and were afterwards by them severally subscribed in my presence.

Said depositions were taken at the request of said Helen M. Macdonald, to be used in the matter of interference in a case now pending in the Patent Office at Washington, in the District of Columbia, in the United States of America, between Helen M. Macdonald, William H. Gallup, James L. Hutton, and M. Herbert Chase, and the said M. Herbert Chase was duly notified, as appears by the notice hereto annexed, with acknowledgment of service thereon, and was present at the taking of said depositions before me; and said Gallup and Hutton were duly notified of the time and place of taking said depositions, as appears by the affidavit of said Helen M. Macdonald, and the post-office receipts thereto annexed, all being hereto annexed, but were not present at the time of taking said depositions, neither in person nor by attorney.

JOHN DAVIS,
Justice of the Peace.

145 In the Matter of Interference: HELEN M. MACDONALD, WILLIAM H. GALLUP, JAMES L. HUTTON, M. HERBERT CHASE.

LOWELL, *March* 18, 1874.

M. Herbert Chase.

SIR: You will please take notice that on Wednesday, March 25, 1874, commencing at 9 o'clock a. m., at my office in the Savings Bank Building in this city, and before a proper officer, it is proposed to proceed to take the depositions of Joseph F. Bedell, of Linneus, Maine; Helen M. Macdonald, Mary Arlen, Mrs. Geo. W. Varnum, and Rebecca Ricker, all of Lowell, Mass.; Abbie Cutter, Mary Thayer, and Betsy Stone, of Boston, Mass.

The said examination will be adjourned from day to day until completed.

You are invited to be present and cross-examine the said witnesses.

HELEN M. MACDONALD.

LOWELL, MASS.

Service of a copy of within notice acknowledged March 20, 1874.
L. W. SERRELL, *Attorney.*

Return Registered Letter Receipt.

No. 644. MIDDLESEX CO., 3 | 20, 1874.

Mailed at Lowell, Mass., by Miss H. M. McDonald, a letter addressed to Wm. H. Gallup, New York.

Received the above-described letter, S. J. G.

W. H. GALLUP,
Per G. H. COLLINS.

New York, Mar. 23, 1874. Registered.

146 In the Matter of Interference: HELEN M. MCDONALD, WILLIAM H. GALLUP, JAMES L. HUTTON, and M. HERBERT CHASE.

LOWELL, MASS., *March* 18, 1874.

M. Herbert Chase.

SIR: You will please to take notice that on Wednesday, March 25, 1874, commencing at nine o'clock a. m., at my office in the Savings Bank Building in this city, and before a proper officer, it is proposed to proceed to take the depositions of Joseph F. Bedell, of Maine; Helen M. McDonald, Mary Arlin, Rebecca Ricker, and Mrs. George W. Varnum, all of Lowell, Mass.; Abbie Cutter, Mary Thayer, and Betsy Stone, of Boston, Mass. The said examination will be adjourned from day to day until completion.

You are invited to be present and cross-examine the said witnesses.

HELEN M. MACDONALD.

I, Helen M. Macdonald, on oath depose and say: That I tendered with my own hand a notice, of which the foregoing is a copy, to M. Herbert Chase, at two o'clock in the afternoon on the eighteenth day of March, A. D. 1874, at my office in Lowell, Mass.; that he refused to receive the same, and then I stated to him that said notice offered to him was a notice fixing a new time for taking depositions and testimony in the case specified therein; that he went away without taking said notice, though constantly offered and tendered to him by me.

On the twentieth day of the same month I sent a like notice by mail in a registered letter to William H. Gallup, care of J. S. Gordon, 34 Beach street, New York city, in the State of New York, the same being duly directed to said Gallup in care of said Gordon, and I hereby annex the receipt of said Gallup, returned to me in due course of the mail; and on the last-named date I also mailed and sent a like notice to James L. Hutton by registered letter, directed to him New York city, and I hereby annex post-office receipt issued

at Lowell as proof of sending said last letter, but have received no acknowledgment or proof of receipt of said last letter by said Hutton.

HELEN M. MACDONALD.

147 *Receipt for a Registered Letter.*

No. 643. MARCH 20, 1874.

Post office, Lowell, Mass. Received of Miss H. M. Macdonald a letter addressed to James L. Hutton, New York city.

JOHN H. GARDINER.
W. E. H. COOK, *P. M.*

STATE OF MASSACHUSETTS, *Middlesex*, } ss:

MARCH 20, 1874.

Personally appeared the above-named Helen M. Macdonald, and made oath that the foregoing affidavit by her subscribed is true.

Before me—

JOHN DAVIS,
Justice of the Peace.

148 The following is the opinion of the court, of the fifteenth day of October, A. D. 1880, in pursuance of which decree of that date was entered for the complainant:

Opinion of the Court. [*October* 15, 1880.]

Circuit Court of the United States, District of Massachusetts. In Equity.

HELEN M. MACDONALD
v.
JOHN SHEPARD *et al.* } No. 775.

LOWELL, J.:

The plaintiff's patent, No. 155,534, dated September 29, 1874, claims, as a new article of manufacture, a skirt protector for ladies' dresses, having a fluted or plaited border, bound with or composed of enameled cloth, or other water-proof material. As originally granted, it was for a skirt "facing or protector," but the facing was disclaimed in November, 1874. The records of the interference case with one Chase, and of the case in this court before my predecessor, are made part of this record.

In the interference, 6 Off. Gaz., 359, the Commissioner decided in favor of the patentee, and said, among other things: "Macdonald made this invention in 1861, and between that time and 1865 she attached water-proof skirt protectors to four of her own dresses. Short dresses became fashionable in 1865, and, therefore, nothing more was done with this invention until the year 1872, when long dresses were again the style, and Macdonald then commenced experimenting, preparatory to filing an application for a patent."

He afterwards says that an attempt has been made in argument to confound skirt facing with skirt protectors. "These articles," he rejoins, "are entirely distinct in form, and are used for a different purpose. Enameled cloth has been used for the former, but there is nothing in the record to show that it has been used for protectors." He then refers to the patent of Lucinda Humphrey, and finds that oil-cloth, which is described by her, could not be used for a protector operating like plaintiff's; and, as to Mackee's patent, he says it is for a facing which only extends to the edge of the skirt, and that braid is the protector to Mackee's skirt. He then considers the plea of abandonment, and decides against it.

The grounds, then, upon which the patent was granted, were, an invention earlier than Chase's, namely, in 1861, that it had not been abandoned, and that it was not anticipated by a skirt "facing" which extended only to the bottom of the dress, and was bound in with it by a piece of braid.

It is undoubtedly true that the discrimination between a protector and a facing had not been made in common speech at the time of this decision. Facings are protectors in a broad sense, and they were called so before protectors, in the sense of the patent and disclaimer, had come into use. The Commissioner found that enameled cloth wss used for facings of skirts before Miss Macdonald made her invention. He might have added that they were called "protectors;" but since strips of water-proof material have been used to hang below the skirt and braid to protect both, the name is more generally applied, as the office applied it, to this latter article.

Judge Shepley's decision agrees entirely with that of Mr. Leggett, though whether he had the latter opinion before him, I do not know. In Macdonald *v.* Blackmar, 9 Off. Gaz., 746, he says: "I see no reason to doubt that she [Miss Macdonald] was the first and original inventor of this article, as distinguished from a skirt facing, which is an entirely different article, and from a skirt protector, which, being made of wiggan or similar material, was substantially useless for the purpose, as compared with the complainant's invention."

Judge Blatchford has found, upon a preliminary hearing by affidavits, that the date fixed by the Commissioner for the plaintiff's invention was rightly fixed. He also agrees with me that the invention includes a plain, as well as a fluted or plaited, form of water-proof skirt protector. 18 Off. Gaz., 193. This is a somewhat nice question of construction, but I still think it the better opinion.

The evidence in this case brings out very clearly that enameled cloth was used for protecting skirts a long time ago, and perhaps before 1861; but it is not proved, to my satisfaction, that it was used as a protector in the present sense. I think it was probably made into facings. The evidence of the witnesses who sold it is not, and could not well be, very distinct upon this point, as they were none of them women or dress-makers. This case does not vary substantially from the facts proved, or taken for granted, before the Commissioner and before the late circuit judge, unless the evidence of the complainant herself in cross-examination will have that effect.

The complainant, in her anxiety to prove that the Morrison "Protector," which was a strip of enameled cloth, sold for the purpose of protecting skirts, was used as a facing, and not as a protector in the more recent sense, has sworn that enameled cloth of that sort would not be useful as a protector, because it would show its white or non-enameled side below the dress, and because its edge would fray; and that this was the only enameled cloth to be had in the market in 1861, and long after. "If this be so," say the defendants, in
151 substance, "how can you maintain that you invented this thing by the use of such cloth in 1861?" I think the answer to this argument is, that the plaintiff has always insisted that her use of the invention before 1865 was experimental. So strongly was this put by her in the Blackmar case that the defendants argued that she had experimented without success and had abandoned her supposed invention. Judge Shepley found, as the Commissioner had found, that there was no abandonment. Of course, if the invention was put into public use in 1861 the patent is void; but this point was not taken before the Commissioner or before Judge Shepley. The patentee's account of it is that she took some pains to correct the defects of the old enameled cloth, but did not fully reach a satisfactory result until she had some cloth specially prepared for her after she had, as the Commissioner says, resumed her experiments in 1872.

It is always ground for suspicion and scrutiny that a patentee with one breath carries back his invention and with the next declares it to have been so incomplete that his use was only experimental. This is what the plaintiff does, and what the office and Judge Shepley appear to decide that she is entitled to do. I am not prepared to dissent from this conclusion.

The only evidence of infringement is from the plaintiff herself, who produces a strip of water-proof cloth with a strip of India-rubber sewed to its lower edge, which she swears is exactly like what she has seen sold by the defendants as and for skirt protectors. This appears to me a sufficient proof of infringement in the absence of contradiction.

Decree for the complainant.

152 UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, within the first judicial circuit, certify that the foregoing is a true copy of the pleadings and evidence, opinion, and decree in the cause of Helen M. Macdonald, complainant, *v.* John Shepard *et al.*, defendants, in said circuit court determined.

And I further certify that this volume, entitled Vol. I, pleadings and evidence, decree, and opinion of circuit court, and one accompanying volume having my certificate of even date herewith thereto annexed, entitled Vol. II, master's report and exceptions thereto, together contain a true copy of the record and of all proceedings of said circuit court in said cause.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Boston in said district, this seventh day of October, A. D. 1882, and of the Independence of the United States the one hundred and seventh.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

153 *Bond to Party on Appeal.*

Know all men by these presents that we, John Shepard, Henry Norwell, and Robert Ferguson, all of Boston, in the district of Massachusetts, as principals, and John Hogg and Sumner R. Mead, both of said Boston, as sureties, are held and firmly bound unto Edward C. Carrigan, of said Boston, administrator of the estate of Helen M. Macdonald, late of said Boston, in the full and just sum of five thousand dollars, to be paid to the said Edward C. Carrigan, administrator, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the 25th day of September, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas, lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit in equity depending in said court between said Helen M. Macdonald, complainant, and the said John Shepard, Henry Norwell, and Robert Ferguson, defendants, decree was rendered against the said defendants, and the said defendants having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation, directed to the said Edward C. Carrigan, administrator, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said defendants shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOHN SHEPARD. [L. S.]
HENRY NORWELL. [L. S.]
ROBERT FERGUSON. [L. S.]
JOHN HOGG. [L. S.]
SUMNER R. MEAD. [L. S.]

Signed, sealed, and delivered in presence of—

F. A. WEBSTER,
Witness to J. S., H. N., & R. F.

S. ADAM,
Witness to J. H. & S. R. M.

Approved:

T. L. NELSON,
U. S. Dist. Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

154 *Bond to Party on Appeal.*

Know all men by these presents that we, Edward C. Carrigan, of Boston, in the district of Massachusetts, administrator of the estate of Helen M. Macdonald, deceased, as principal, and Benjamin F. Butler, of Lowell, in the district of Massachusetts, and Prentiss Webster, also of Lowell, sureties, are held and firmly bound unto John Shepard, Henry Norwell, and Robert Ferguson, all of said Boston, in the full and just sum of one thousand dollars, to be paid to the said John Shepard, Henry Norwell, and Robert Ferguson, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the seventh day of October, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas, lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit in equity depending in said court between said Helen M. Macdonald, complainant, and the said John Shepard, Henry Norwell, and Robert Ferguson, defendants, decree was rendered against the said defendants for a sum less than the sum claimed by complainant, and the said Edward C. Carrigan, administrator, as aforesaid, of said complainant, having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation, directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Edward C. Carrigan, administrator, shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

EDWARD C. CARRIGAN. [L. S.]
BENJ. F. BUTLER. [L. S.]
PRENTISS WEBSTER. [L. S.]

Signed, sealed, and delivered in presence of—
T. E. MAJOR.

Approved:
T. L. NELSON,
U. S. Dist. Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the

office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

155 *Master's Report. Filed July* 16, 1881.

Circuit Court of the United States, District of Massachusetts. In Equity.

HELEN M. McDONALD *v.* JOHN SHEPARD *et al.*

This suit was brought by bill filed August 7, 1876, upon letters patent issued September 29, 1874, for skirt protector. An answer was duly filed and evidence taken, and a decree was rendered in favor of the plaintiff for injunction and account by his honor Judge Lowell upon October 15, 1880. An order for an account was issued, and an account filed pursuant to the order November 23, 1880. This account, upon examination, not proving complete or satisfactory, was amended and a new account filed December 22, 1880.

It appeared in evidence that the complainant had brought suit upon the same letters patent in this circuit against Blackmer & Mandel, in which the decree was rendered in her favor April 4, 1876. This first case was opened for rehearing, and was reheard before Judge Lowell November 16, 1878, and was again decided in favor of the complainant in December, 1878. The original decision of Judge Shepley in April, 1876, was notified to the defendants in
156 this case, and suit was subsequently brought against the present defendants.

It also appeared in evidence that Messrs. Sidenberg & Co., of New York, were manufacturers of infringing skirt protectors, and guaranteed, in consideration of the purchase of such infringing protectors from them, to indemnify and save harmless these defendants from all loss, damages, costs, and expenses which they might incur or suffer on account of purchasing, selling, or offering for sale dress protectors purchased from said Sidenberg & Co., and also agreed to defend the suits upon the same, and pay the expenses of said suits, including counsel fees, and it is admitted that Sidenberg & Co. have thus far performed this agreement. A copy of an agreement of Sidenberg's with Lewis Coleman & Co., of Boston, admitted to be substantially like the agreement of indemnity given by Sidenberg to these defendants, is annexed as "Master's Schedule No. 1," defendants being unable to produce their own guarantee. It also appeared in evidence that the complainant began the manufacture of skirt protectors, and was engaged in the manufacture before her patent was granted, and that her profits during that time were about $2.75 a dozen, she making them entirely by hand. Various infringements caused the complainant to believe it expedient to seek a licensee for the purpose of manufacturing, in order to compete vigorously with the infringements, and an agreement was made for a license somewhere about November 10, 1874, with E. M. Watson, of Boston. By this agreement Watson was to pay forty per cent. of the

net profits arising from the sale of said skirt protectors, and one-half of the expenses of litigation. This agreement of license continued one year and six months, and under it the complainant received royalties amounting in cash to about sixteen cents a dozen,
157 and payments of litigation expenses substantially amounting to nine cents a dozen, in addition, making her total royalty from Watson under that contract twenty-five cents a dozen. After the failure of Watson the complainant again took up the manufacture, and had them made by contract and attended to the sale herself, with a profit much larger than said royalty of twenty-five cents a dozen. Sidenberg began infringing in 1874 and continued it till enjoined on the fifteenth of October, 1879. The Watson contract, as I have said, yielded twenty-five cents a dozen, but by its terms, I am of opinion, would have yielded more had not his bankruptcy occurred.

It is in evidence that Sidenburg told the complainant that he had made hundreds of thousands of dozens. Young, a former agent for Sidenberg, testified that before February 19, 1879, he sold the Sidenberg goods in and around Boston, and that he was selling the goods for about four years, and that the total amount of the sales in and around Boston were $55,000. He also testified that the Boston business was from one-quarter to one-fifth of the whole business of Sidenberg. This would give the entire business of Sidenberg during the time of the infringement at $250,000, and the number of dozens sold by him, at an average price, discount taken off, of a dollar and a quarter a dozen, which seems to have been about the average price actually received, 200,000 dozen. This confirms the statement of complainant.

Another infringing dress protector extensively sold in Boston was the Lougee dress protector or dress extender, the dress extender being a deeper style of the same goods. Waring, another witness, testified that Lougee sold very large quantities of skirt protectors and extenders, not less in all, in a year and a half, than 1,200 dozen and not more than 1,800 dozen. Richardson testified that he sold goods for Chisholm at the rate of $1,500 worth a
158 month, or about a hundred dozen; and afterwards for Reinhart & Lyon about quarter as many, or 25 dozen a month. Neither Lougee, Chisholm, or Reinhart & Lyon nor any other infringing manufacturer guaranteed Shepard, Norwell & Co. from the consequences of infringement.

Two charges are made by the complainant against the defendants, one of them based upon profits which they have made, and the other alleging damages. In the computation of profits hereafter made in the "Master Schedule A" I have adopted the items of defendants' second account.

I was requested by the complainant to consider and apply to this case the doctrine of common law as to the assessment of damages against joint trespassers, and was asked to assess damages not only upon all the goods sold by Shepard, Norwell & Co., but upon all the goods sold by the other parties to whom I have already referred as infringers. I think that the doctrine of joint trespass is certainly

inapplicable to a case where there is no agreement of indemnity for continuing infringement given by an infringing manufacturer to a dealer, for in such a case there is no such relation of common knowledge and common tortious object as in the case where the indemnity is demanded and given. But I am of opinion that where a notification of infringement has been given by a patentee to a dealer after the patent has been sustained, and that notification produces, upon demand of the dealer from the manufacturer who supplies the dealer, a bond of indemnity against the consequences which may follow from selling the goods, the relation of joint trespassers arises, and the defendants are liable for the whole damage caused by the trespass in which they are together engaged. The relation may perhaps arise under a less accumulation of circumstances.

This trespass may be looked upon in two ways; in one
159 way it is to be considered only as a trespass committed by the manufacturer and dealer in manufacturing and selling the goods sold by the dealer. This would not extend the damages beyond the damage caused by the dealer alone, and so there would be no difference between the dealer considered as joint trespasser and as sole trespasser.

Now, as I understand this law, a vendor of merchandise specially designed for a specific purpose, by implication, warrants its free use for that purpose. If it be a sewing machine, for instance, he is bound to furnish a sewing machine, and not merely a quantity of wood and iron, containing a lawsuit and a privilege to pay damages for infringement. And I believe that without a specific guarantee a purchaser of an infringing article, in the usual course of trade, without notice at the time of purchase or delivery that it is sold under a claim of infringement and at the buyer's risk, can recover against his vendor the damages, expenses, and costs he is forced to pay for his infringement by use or sale of such infringing article so bought in the usual course of trade. In other words, goods sold as merchandise in open market are warranted by the vendor to be such goods as are billed, free of claim from another owner who has a monopoly of the form which gives them their salable quality and characteristics as billed, as distinguished from raw material.

This I understand to be the doctrine of Lightner *v.* Brooks.

The guarantee in this case was something more than this. It was a joint undertaking to continue an alleged infringement, after a patent had been adjudged valid, by which Sidenberg was to continue to make and supply the defendants with the article complained of, at a price, to be paid by defendants, which should allow them a margin of profit; and defendants should continue to sell, until re-
strained by the court, the goods complained of, Sidenberg to
160 bear the consequences of the decree against defendants to defend the case, and generally to hold the defendants harmless. Of course, if there were no infringements found, this was not improper. But if infringement is found, I think the arrangement is one which is a commercial conspiracy to beat a patent, in which each party is responsible for the damages caused by all or either of

the others, but not for the profits made by the others. I think the situation similar to that of Muzzey *v.* Davis, 54 Maine, 361, where defendant was held liable for the whole value of a sidewalk, wrongfully sold by the city of Portland, although he only removed part of the materials. (See Scott *v.* Perkins, 28 Maine, 22.) It has been held that the giving of a bond of indemnity to a sheriff to induce him to levy an execution on property not belonging to the execution debtor creates the relation of joint trespasser in the obligor, and that he is liable for the value of the property, and not merely for the amount realized at the execution sale. (Possoin *v.* Henderson, 2 E. D. Smith, 146.)

The work in which the manufacturer and dealer are jointly engaged is not simply the buying and selling of a few dozen goods, but it is the continuance of an infringing manufacture in the market by an infringing manufacturer, with the active co-operation of dealers who have been given a guarantee against loss, that they may continue the business for the profits of the manufacturer as well as for their own trade profit. I do not think the continuance of the infringing manufacture and sale to be a remote consequence of the act. I consider it to have been the immediate motive of Sidenberg in giving, and the continuance of the sale to have been the immediate motive of defendant in asking, the bond. Surely,

161 without a dealer to sell the manufacturer would not have continued nor been injurious to complainant; and equally, surely, had the manufacturer not made and put out the goods the dealer would not have sold.

I therefore hold that all the damage caused by an infringing manufacturer, by putting into the market through dealers infringing goods, is liable to be assessed against any of the dealers to whom he has given a bond of indemnity. And this I consider in harmony with another doctrine of the law to prevent multitudinous litigation. It is not unjust to the obligor in the bond, because he, if the damages are paid or arranged, cannot be recovered from a second time, whether he has repaid them to the dealer or not.

Upon an examination of the account rendered by the defendants it appears that Sidenberg & Co. furnished to the defendants $2{,}461\frac{3}{4}$ dozen, and that the defendants made, over and above expenses of sale, $1{,}214\frac{15}{100}$ dollars. I also find that this amounts to a profit of 50 cents a dozen to the retailer, and that the profits to the manufacturer were not less than the same amount. From the examination of Watson's account I am of opinion that 25 cents a dozen was the only compensation in the nature of royalty complainant ever received. It would have been a fair royalty, and would have been accepted by the complainant, and that this royalty, if assessed upon the Sidenberg goods, 200,000 dozen in all, would amount to $50,000; and I find that the defendants, by the selling of the Sidenberg goods under a bond of indemnity, are responsible to the complainant for all the goods made by Sidenberg, and that those sales damaged the complainant to the amount of more than $50,000.

I further find that the defendants sold of goods manufactured by the New York Novelty Company 458 dozen, at a profit of $244.94,

and that they should pay this sum in addition. I further
162 find that they, defendants, sold of goods manufactured by Lougee and the Standard Rubber Company (which was Lougee under another name) 47 dozen, and they made a profit thereon of $16.29, for which they also ought to account. I further find that on the goods purchased from Colby, 12 dozen, they made a profit of $6.05. I further find that they purchased 7 dozen of protectors from Griffith, on which they made a net loss of 22 cents, and on which they should be charged damages at the rate of 25 cents a dozen, amounting to $1.75. I further find that they purchased 5 dozen from E. J. Seymour & Co., on which they made a net profit of $1.95. I further find that they purchased six dozen from the Woven Tape Skirt Works, on which they made a net profit of $4.26. I further find that they purchased 311 dozen from E. N. Watson & Co., which were licensed goods. I further find that they purchased from the Gossamer Rubber Cloth Company 29 dozen, on which they made a net profit of $34.48. I further find that they purchased from J. R. Scholes & Co. 29 dozen, on which they made a net profit of $2.16. I further find that they purchased from Nathan Hyman 24 dozen, on which they made a net profit of $24.82. I further find that they purchased of Reinhart & Lyon 12 dozen, on which they made a net profit of $2.09. I further find that they purchased of S. H. Doughty 48 dozen, on which they made a net profit of $9.84. I further find that they purchased of J. W. Chisholm 40 dozen, on which they made a net profit of $8.11. I further find that they purchased of Prince & Aldrich 5 dozen, on which they made a profit of $1.41. I further find that they purchased of Milliken Brothers 20 dozen, which were licensed goods. I further find that they purchased of Howard C. Milliken & Co. 63 dozen, 10 dozen of which were licensed goods and 53 dozen unlicensed goods, and that the profits on
163 the unlicensed goods were $14.78. I further find that they purchased of Milliken, Anderson & Co. 159 dozen, 77 dozen of which were licensed goods and 82 dozen unlicensed, and that they made on the unlicensed goods a profit of $22.88. I further find that they purchased from Mandel, Taylor & Co. 5 dozen, on which they made a profit of 39 cents. I further find that they purchased from John B. Babcock & Co. 220 dozen, on which they made a profit of $32.12. I further find that they purchased from M. H. Chase 224 dozen, on which they made a profit of $55.48.

I have scheduled, as Master's Schedule A, the names of the houses from whom defendants bought goods, the numbers of dozens, and the profits on each sale; in Master's Schedule B, the names of the houses from whom defendants bought goods on which they realized less profits than the damage, at the rate of 25 cents a dozen, to be added to the damages; in Schedule C, the damages caused by Sidenberg's whole manufacture over and above the profits derived by defendants from the Sidenberg goods sold by them; and in Master's Schedule D these items are combined, and I report that defendants have made a profit by their infringement of seventeen hundred and six dollars and eighteen cents, and that they should pay, in addition to this, twenty-nine dollars and fifty-two cents for damages on

goods other than Sidenberg's, sold at a less profit than twenty-five cents a dozen, or seventeen hundred and thirty-five dollars and seventy cents for profits and damages on goods that actually passed through their hands and were in their possession, and that there should be added to this, as damages caused by the Sidenberg tort, in which they aided and abetted to an extent which makes them principals, and fully responsible, over and above the profits realized by them from the goods they sold from this source, the sum of forty-eight thousand seven hundred and eighty-five dollars and
164 eighty-five cents, and that judgment should be entered against defendants, for damages and profits, in the sum of fifty thousand five hundred and twenty-one dollars and fifty-five cents.

At request of defendants, I transmit a schedule of the makers of goods introduced in evidence before me, together with the goods as exhibits, as Master's Schedule E. Those numbered as E 4, 5, 6, 7, were introduced by defendants, were not water-proof goods, and no profits or damages were allowed upon them.

Master's Schedule A.

Manufacturers.	Dozens sold.	Profit.
Sidenberg & Co.	2,461¾	$1,214 15
New York Novelty Company	458	244 94
Lougee & Standard Rubber Company	47	16 29
Colby	12	6 05
Griffith	7	Loss.
E. J. Seymour	5	1 95
Woven Tape Skirt Works	6	4 26
Gossamer Rubber Cloth Company	29	34 48
N. Hyman	24	24 82
J. R. Scholes & Co.	29	2 16
Reinhart & Lyon	12	2 09
S. H. Doughty	48	19 84
J. W. Chisholm	40	8 11
Prince & Aldrich	5	1 41
H. C. Milliken & Co.	53	14 78
Milliken, Anderson & Co.	82	22 85
Mandel, Taylor & Co.	5	39
John B. Babcock	220	32 12
M. H. Chase	224	55 48
	3,767¾	$1,706 18

165 *Master's Schedule B.*

Manufacturers.	Dozens sold.	Damages beyond Profits rec'd.
Griffith	7	$1 55
J. R. Scholes & Co.	29	5 09
John B. Babcock	220	22 88
Damages to be added to profits as less than royalty on goods sold other than Sidenberg's		$29 52

Master's Schedule C.

Damages caused by the joint trespass of Sidenberg with the defendants, $50,000, or $48,785.85 in excess of profits.

Master's Schedule D.

Profits as per Schedule A	$1,706 18
Damages as per Schedule B	29 52
	$1,735 70
Damages as per Schedule C	48,785 85
	$50,521 55

Schedule E.

No. of Exhibit.	Trade name.	Maker.
E 1.	Princess train.	New York Novelty Company and Schwab.
E 2.	Train extender.	Lougee.
E 3.	Sidenberg, No. 10 and No. 6.	Sidenberg.
E 4.	No. 2, train, non-water-proof.	New York Novelty Company and Schwab.
E 5.	Novelty skirt extender, not water-proof.	New York Novelty Company and Schwab.
E 6.	Plaited Princess, not water-proof.	Unknown.
E 7.	No. 2, extender, non-water-proof.	Novelty Co. and Schwab.
E 8.	Faultless D. P., water-proof.	Sidenberg & Co.
166		
E 9.	Schwab dress protector.	New York Novelty Company and Schwab.
E 10.	Macdonald skirt protector.	Watson.
E 11.	Skirt protector, water-proof.	Lougee & Co.
E 12.	Water-proof skirt protector.	Richardson.
E 13.	Victoria skirt protector.	J. R. Scholes.
E 14.	Hyman's skirt protector.	Hyman.
E 15.	Water-proof skirt protector.	Sidenberg.
E 16.	Standard skirt protector.	New York Novelty Company and Schwab.
E 17.	Centennial skirt protector, water-proof.	Richardson.
E 18.	Metropolitan, Centennial, and Star skirt protectors.	Chisholm, or Reinhart & Lyon.
E 19.	Day protector, water-proof.	Sidenburg.
E 20.	Day patent dress-facing, rubber wearing-strip or edge.	Sidenburg.
E 21.	Skirt protector.	New York Novelty Company and Schwab.
E 22.	"Eclipse."	Chisholm, or Reinhart & Lyon.
E 23.	Printer's roll skirt protector.	Doughty.
E 24.	Combination.	Unknown; prob'ly Seymour, Brooklyn, N. Y.
E 25.	Water-proof skirt protector.	H. M. Macdonald.
E 26.	(1873) Macdonald dress protector.	H. M. Macdonald.

I believe the damages above found, of fifty thousand dollars, are far less than the injury caused complainant by loss of her monopoly of the business, and less than half the profits made by Sidenburg from his infringement. And I therefore report that the damages awarded in this case be increased by a sum at least sufficient

to cover all the expenses of litigation in which complainant has been involved on this patent. These expenses, she stated before the master, amounted to over twenty thousand dollars, for
167 most of which she is still indebted. And I therefore recommend that the damages be increased in this case in the sum of at least twenty-five thousand dollars, to cover present and prospective disbursements and obligations of her litigation.

I have been asked to assess damages upon a higher *modus*, and to take as the *modus* the profits she could have made had she had the monopoly and been able to sell all the goods sold by Sidenberg. Had these things occurred she could have made at least $150,000, or at least seventy-five cents a dozen on at least two hundred thousand dozen; but I think the evidence fails to show affirmatively her ability to have made such extensive sales, or to enable me to say to what extent she could have made them. So I have adopted the Watson payment in the nature of royalty as certainly a low one, and amounting to only half the retailers' or manufacturers' profits as the measure of damages.

THOS. WM. CLARKE, *Master*.

168 *Second-Draft Report.*

After submitting the foregoing as a first-draft report the time for filing objections, &c., was extended, at the request of counsel, from time to time till May 25, 1881, and on said 25th of May counsel submitted papers as follows:

Complainant's Requests. [*Filed May* 25, 1881.]

BOSTON, MASS., *May* 24, 1881.

DEAR SIR: I desire one or two matters of fact to be added to your report in the case of MacDonald *v.* Shepard, Norwell & Co., which, with your leave, I will state, as I understand the facts, to be corrected by your own remembrance of the evidence, if I err.

First. I desire it stated that the defendants presented a first account in the accounting, a copy of which should be annexed, verified by their oath, and supported by the testimony of their purchasing agent and book-keeper.

The purchasing agent, one Cole, testified, in substance, that he made all the purchases for the house of articles of like description to those in controversy; that he knew he had not bought any articles of that kind, except from Sidenberg & Co.; that he knew that no more had been purchased, and therefore that no more such articles than stated in the account had been sold; that none had been bought or sold at other and different prices than those stated in the account; that his firm had an indemnity from Sidenberg & Co., and that they dealt with that firm exclusively. And on being shown several different patterns of water-proof skirt protectors, declared that none of that kind had been bought by the defendants.

The book-keeper, one Webster, testified to the correctness of the account; that he made it up after full consultation with the purchas-

ing agent, and that the same was correct; that the complainant then summoned in the head of the retail sales department of the
169 firm, and produced the several different kinds of skirt protectors or skirt defenders that are embodied in your report as having been sold by the firm, and showed them to him, one after another, asking him if on a certain occasion and at a certain time he did not sell those several articles to a person or persons named to him. He admitted that he had so done. That thereupon the complainant moved the master that the books of the defendants be produced before him for examination. That thereupon the defendants asked leave to amend their account, and filed a second account, which is the account reported upon. And it was agreed between the parties that an expert should go over the books of the defendants and verify the amended account which they had filed.

Second. I desire it to appear in the report that, it appearing that the case was defended by Sidenberg & Co., that they employed the counsel, and it being admitted that the first account filed was an account furnished the defendants by said Sidenberg & Co., and had been verified, filed, and supported by the oaths of the book-keeper and purchasing agent, without any examination of their books whatever, and without any knowledge upon the subject, except that they had received such an account from Sidenberg & Co. to be filed, the master should order Sidenberg & Co. to come before him for examination and verification of the account, and produce their books and allow them to be examined by an expert to be agreed upon by the parties, to be appointed by the master, Sidenberg & Co. being the manufacturers in New York of the principal part of the articles claimed to be sold. This the defendants' counsel, admitting that he was employed for Sidenberg in defence of the case and was in consultation with Sidenberg, positively refused to do.

Third. I wish it further to appear that, acting under the advice of George E. Betton, who was at that time counsel for Miss MacDonald, she made the arrangement with Watson & Co., set forth in the master's report; that whatever was paid by Watson was received by Betton, and retained by him for his fees; that Watson soon afterwards failed, and his stock, which amounted to some thousands of dozens, was thrown on the market, on which the complainant received no license fee, royalty, or profit whatever.

170 Fourth. That witnesses were produced by the plaintiff, who testified that they had sold to Cole himself several of the infringing articles other than Sidenberg's, which are set out in the master's report as having been sold by the defendants.

Fifth. That several of the articles set out in the master's report as having been sold by Shepard, Norwell & Co. were of very inferior quality, and, although an infringement of the complainant's patent, they were substantially useless as articles of consumption, and largely broke down the market for skirt protectors by bringing discredit upon the skirt protectors described in the patent as a useful article of manufacture.

Sixth. That these facts were not controverted by any evidence on the part of the defendants.

I believe I have stated the facts with substantial correctness, and think it necessary, for a full understanding of the report upon the question of damages and the increase of damages, that they should appear as ground for the action of the master, and of the court upon the master's report.

I have the honor to be, very respectfully,

BENJ. F. BUTLER,
Counsel for Complainant.

Defendants' Objections to Master's Draft Report and Requests.

The defendants object to the master's draft report herein—

1. For that the master has found damages against the defendants to an amount exceeding $20; whereas under the Constitution and laws of the United States it is not competent for the master to find damages to any amount exceeding $20. And they request the master to amend his report in this particular.

2. For that the master, contrary to the evidence and the law, has found the defendants liable to the complainant for all the damages to her caused by reason of the manufacture and sale of all the Day skirt protectors manufactured and sold by G. Sidenberg & Co.;
171 whereas the master, on the law and the evidence, should have found that the defendants were only liable, if at all, for the damage caused to the complainant by the sale of infringing skirt protectors sold by the defendants. And they request the master to amend his report in this particular; and if the master shall decline so to do, they request him to report to the court all the evidence before him relating to or showing the connection or relations of the defendants with G. Sidenberg & Co.

3. That the master, contrary to the evidence, has reported that the defendants and G. Sidenberg & Co. were engaged in "a commercial conspiracy to beat" the complainant's patent, and were joint trespassers upon the rights of the complainant as to all the Day skirt protectors manufactured and sold by said G. Sidenberg & Co., whether sold to or by the defendants or not; whereas the master should have found, on the evidence, that the defendants had no interest in or control over the business of said G. Sidenberg & Co., and that their only connection with them was to buy goods of them, including skirt protectors, as of any other manufacturer or dealer, and resell the goods so bought on their own account, save that upon notification by the complainant, after they had been selling skirt protectors bought of G. Sidenberg & Co. for a considerable time, that such protectors infringed her patent, they so notified G. Sidenberg & Co., who thereupon agreed to indemnify the defendants against damages and costs by reason of the sale of such skirt protectors, and the defendants continued from time to time to buy of said G. Sidenberg & Co. and resell such skirt protectors. And they request the master to amend his report in this particular; and if the master shall decline so to do, they request him to report to the court all the evidence before him relating to or showing the connection or relations between the defendants and G. Sidenberg & Co.

4. For that the master has reported that the agreement of indemnity given by G. Sidenberg & Co. to the defendants was admitted to be substantially like the agreement of G. Sidenberg & Co. with Lewis Coleman & Co.; whereas no such admission was made, and there was no evidence before the master that such was the fact. And they request the master to amend his report in this particu-
172 lar, and if he shall decline so to do, they request him to report to the court all the evidence before him relating to or showing the agreement between G. Sidenberg & Co. and the defendants.

5. For that the master, contrary to the evidence and upon incompetent evidence, has found that the total number of infringing skirt protectors manufactured and sold by G. Sidenberg & Co. was 200,000 dozen; whereas the master should have found and reported that there was no competent evidence before him showing the number of such skirt protectors manufactured and sold by G. Sidenberg & Co. And they request the master to amend his report in this particular, and if he shall decline so to do, they request him to report to the court all the evidence before him relating to the number of such skirt protectors manufactured and sold by said G. Sidenberg & Co.; and further, that the defendants objected to all such evidence as incompetent and immaterial.

6. For that the master, contrary to the evidence, has found against the defendants the damages to the complainant by reason of the manufacture and sale of infringing skirt protectors, at 25 cents per dozen, or $50,029.52 in all; whereas, upon the evidence, he should have found and reported that no damages had been proved. And they request the master to amend his report in this particular, and if he shall decline so to do, request him to report to the court all the evidence before him relating to or showing such manufacture and sale, and the extent thereof, and the damage to the complainant by reason thereof.

7. And they further request the master to find on the evidence, and report, that the complainant brought a suit in equity against said G. Sidenberg & Co., in the southern district of New York, in the fall of 1879, for alleged infringement of her patent by the manufacture and sale of the Day skirt protectors here in controversy, which said suit is still pending in said court.

8. And they further request the master to report to the court that at the outset the defendants objected to all evidence offered on behalf of the complainant relating to or showing the manufacture and sale by G. Sidenberg & Co. of Day skirt protectors other than those sold by them to the defendants as incompetent and immate-
173 rial on this accounting; and it was agreed that said objection should be taken as applying to all such evidence offered on behalf of the complainant during the accounting, without repetition thereof, whenever such evidence was offered; which said objection the master overruled, and admitted the evidence, the defendants excepting.

9. And the defendants object to the master's recommendation of

an increase of damages as improper and not within the scope of the duty or authority of the master herein.

By their solicitors, BROWNE, HOLMES & BROWNE.

Pursuant to the request of counsel, the master reports as follows:

The master's notes of evidence are meagre memoranda in a narrative form, and no request was made to have the evidence taken at length. The report of evidence, therefore, hereinafter given is a statement of the results of testimony rather than of the testimony itself.

Findings of Fact.

First. Proceedings before Master.

On November 23, 1880, the defendants submitted an account in the form following:

Sales of Sidenberg & Co's Dress Protectors by Shepard, Norwell & Co., from August 27, 1875, to April 30, 1879.

Date.	Quantity.	Price paid.	Amount.	Price sold.	Gross profits	Net profit.
Aug. 27, 1875 to Apr. 30, 1879	751 doz. No. 6	$1.60 less 15%	$1,201 60	~~708~~ doz. at $1 80	$316 93	$161 07
	544 " " 10	$1.60 " 15%	870 40	509 " " 1 37½		
	1,295 dozen.		2,072 00	$2,078 13		
		Less 15%	310 80			
			$1,761 20 net			

SHEPARD, NORWELL & CO.,
By JOHN SHEPARD.

174 COMMONWEALTH OF MASSACHUSETTS, *County of Suffolk:*

BOSTON, *November* 17, 1880.

Personally before me came John Shepard, known to me to be a member of the firm of Shepard, Norwell & Co., who signed in my presence and made oath that the statements above made are true and correct to the best of his knowledge and belief.

[SEAL.] JAMES H. DEXTER,
Notary Public.

On the same day complainant objected to this account as not full and for other reasons; and the master ruled that on its face it was not a full account of the dress protectors sold by Shepard, Norwell & Co., but might prove on investigation to be so.

Thereupon Franklin A. Webster, book-keeper for Shepard, Norwell & Co., testified, in substance, that the defendants had bought skirt protectors of G. Sidenberg & Co., and of no one else, to his knowledge; that the figures under the heads "Date," "Quantity," "Price paid," and "Amount," were received from G. Sidenberg &

Co.; and the figures under the heads "Price sold," "Gross profit," and "Net profit," were his own, and were estimates made by himself and the gentleman in charge of the domestic goods department; that the amounts and prices of sales were not taken from books of account but were estimated.

E. Edward Cole testified in substance, that he was the defendants' buyer for the domestic department; that skirt protectors belonged in that department; that he had an indistinct recollection of other kinds than Days's, which were those bought of G. Sidenberg & Co.; that he had seen Macdonald's skirt protector and one other, made by the New York Novelty Company, or Schwab, but didn't re-
175 member that he bought any of those; that he had made a small purchase of Scholes, and had bought some of Schwab and of Lougee, but not any within two years; he did not remember about the Chisholm skirt protector, or the Rubber Clothing Company's or Doughty's, or Hyman's, or Thompson & Son's, or Aldrich's; that he did not remember any change or difference of prices.

He said he helped to make up the account. The top line, date, quantity, and the account, as far as the figures under "price sold," were furnished by G. Sidenberg & Co., and the rest of it was filled in afterwards from estimates without examination of books.

He testified besides that defendants got a cash discount of five per cent. in addition to the fifteen per cent. charged in the account.

The purchasing agent's, Mr. Cole, testimony was rather that he didn't remember that any dress protectors other than Sidenberg's had been purchased than that he did remember that dress protectors other than Sidenberg's had not been purchased. Many samples, afterwards recognized as sold by defendants and included in their second account, were shown to him, but the purchasing agent did not recognize them.

The salesman at the head of the retail department having charge of those goods, Mr. Welch, was called as a witness by the complainant. He recognized, as goods dealt in by defendants, the two kinds of Day protectors made by Sidenberg, one sewed and one moulded; another kind that had some water-proof box-plaiting upon it, the Schwab protector; one other, made in imitation of defendants' protector, the Centennial, the Star, the Metropolitan; another something like Improved Eclipse, and a kind which he called
176 "Printer's roll" protectors, and which afterwards was identified as Doughty's.

He stated that the Sidenberg protectors were retailed by defendants at prices varying from fifteen cents each to twenty cents each, the cheapest sort being at fifteen and the highest at twenty.

Complainant then moved that the master order the books of defendants to be produced before him for examination, but the master permitted, on defendants' motion, defendants to cause a new and detailed account to be made from their books by a disinterested expert book-keeper, to be employed by defendants for that purpose; and adjourned the hearing for fifteen days to make it.

This second account is the one upon which the master acted. It was carefully made up and submitted to counsel on the 9th of De-

cember, and the case was further adjourned to the 22d of December for the completion, revision, and classification of the account.

Second. Indemnity.

Inquiry was made, under objection, whether the defendants were indemnified in any way. The master ruled that the question of indemnification of a dealer as a dealer might affect the question of damages and the measure of damages, and admitted the inquiry. The defendants excepted to the admission of any evidence on this subject, or to its consideration by the master, but the master has considered it.

The evidence on the subject of indemnification by G. Sidenberg & Co. to the defendants was substantially this:

177 Mr. Shepard, a defendant, said that on notification from the complainant, before suit brought, that the Sidenberg goods infringed complainant's patent, defendants stopped selling for a few days, and communicated with Sidenberg; that Sidenberg then indemnified the defendants, and they began again to sell the infringing goods. Mr. Shepard thought this indemnity was in writing. Young, agent in Boston of G. Sidenberg & Co., testified to distributing to their purchasers letters of indemnity from Sidenberg & Co. to jobbers of their goods. These letters of indemnity were substantially alike as he remembered. Mr. Shepard agreed to have the paper he thought he had sought for, and produced, if found; but said afterwards he was unable to find it. The paper given to Lewis Coleman & Co. by G. Sidenberg & Co. was produced, and the indemnity stipulated in that paper is, so far as this case has yet gone, the indemnity given in this case. The master's recollection is, that this paper of Coleman & Co. was produced under a verbal understanding that it was like the one originally given to defendants, but he did not minute this agreement on his notes.

Mr. Shepard said his firm had paid no bills for the defence of the suit, had retained no counsel, and it was agreed that they were to be held harmless from loss. Mr. Webster, the book-keeper, confirmed this statement. Mr. Shepard said the defendants "went on selling, because we were indemnified." Further, defendants' counsel stated to the master that he was acting in the hearing on the retainer of G. Sidenberg & Co.

Demand was made by complainant for the production of Sidenberg and the books of his concern before the master, but the defendants' counsel declined; and the master ruled that he had no power to order it, as the party and the books were out of the district.

178 The whole of this transaction being within the knowledge of the actual defendants in this suit, G. Sidenberg & Co., fully explainable by them, and no explanation made, on familiar rules of evidence the master considered himself justified in finding as facts, and he did find as facts:

That defendants began to infringe by sales of goods bought of G. Sidenberg & Co.

That complainant notified them of infringement.

That defendants stopped the sale, and notified G. Sidenberg & Co. of the claim.

That G. Sidenberg & Co. then, for the purpose of inducing defendants to continue to infringe, gave a written agreement of indemnity substantially like that given to Lewis Coleman & Co.

That thereupon defendants resumed the infringement in consequence of this agreement of G. Sidenberg & Co.

That in consequence of this resumption of the infringement, Sidenberg's infringing goods were continued in the market, not only to the limited extent of their own sales, but also by encouraging other dealers, by their example, to do likewise.

That thereby defendants lent their name and influence to the contestants of complainant's rights under her patent.

But that defendants obtained no direct benefit from said infringement, except from profits on goods sold over their own counters, to the amount of only 2,461¾ dozen, the remainder going into consumption through other retailers, and defendants having no direct connection with or knowledge of these other sales for consumption.

That defendants have been maintained in their defence of this suit from first to last by G. Sidenberg & Co., and have no real interest in the defence.

179 That G. Sidenberg & Co. are the real defendants in the case.

And that pursuant to this undertaking, when an account was ordered, the account was made up by G. Sidenberg & Co., and was sworn to in a perfunctory way, and without verification, by defendants, which account was not correct even of the Sidenberg goods.

As a conclusion from these facts and the circumstances the master found that the defendants and G. Sidenberg & Co. were joint trespassers, and that the common design was the design of Sidenberg to continue to violate the complainant's rights under her patent, and that all the damages caused by the acts of either or all of the parties to this common design could be assessed in this proceeding; and he further found that no principle of equity prevented or rendered needlessly harsh the application of this rule of law in this case.

This seems to be all that is necessary to be said by the master on defendants' second and fourth objections and on the first and second requests of complainant.

As to the third request of complainant: It did appear in the evidence that at one time Mr. Geo. E. Betton was counsel for Miss MacDonald. He advised and negotiated the arragement with Watson & Co. referred to in the master's report. Certain moneys, about $1,500, were paid by Watson to Mr. Betton, and were retained by him for his fees. Watson failed and his stock was sold, and a balance of royalties due to Miss MacDonald was not paid to her.

The amount of stock thus thrown upon the market did not appear, but the complainant did not receive any royalty upon the stock so thrown upon the market.

As to the fourth request of complainant: Other infringing
180 articles besides those manufactured by Sidenberg were sold to the defendants through their buyer, Cole, namely, goods made by Lougee, Schwab, and others.

As to the fifth request of complainant: Several of the skirt protectors sold by defendants, not made by Sidenberg, were of inferior quality and were of very limited durability. The master has no doubt that the introduction of these inferior goods injured seriously the market for skirt protectors, but he has based no action on this consideration, and in the view he has taken of the case does not deem it material or computable.

As to the sixth request of complainant: It is true that the facts heretofore set forth in answer to the requests of complainant's counsel were not seriously controverted by defendants' evidence.

But the conclusions drawn by the master from them were controverted.

As to the first objection of the defendants: It is true the master has found damages to an amount exceeding twenty dollars. Under the Constitution of the United States it is believed that Congress has power to pass an act authorizing the finding of damages in a suit not at common law exceeding twenty dollars without trial by jury. It is certain that under the equity practice of England and of the United States an inquiry into damages or profits has been for many years ancillary to an injunction bill. An act of Congress authorizes the inquiry specifically in cases upon such a subject-matter as this.

As to the third objection: In addition to what has been said as to the second and fourth, it is true that defendants had no interest in or control over the business of Sidenberg & Co. in any such sense as a partner has interest or control.

Defendants' business connection with G. Sidenberg & Co.
181 was to buy of them skirt protectors or any other salable goods for the purpose of selling again, in confident expectation of profit. Being engaged in this business, complainant notified defendants that skirt protectors made by and bought from G. Sidenberg & Co., and jobbed or retailed theretofore by defendants, infringed complainant's patent, and that the patent had been decreed valid by the courts. Defendants stopped the sales temporarily, and notified G. Sidenberg & Co., who agreed to indemnify defendants against damages and expense by reason of the sale of such skirt protectors; and defendants thereafter, in consequence of this indemnity, continued to buy said G. Sidenberg & Co.'s skirt protectors, and resold them. G. Sidenberg & Co. have up to this time honorably performed their agreement of indemnity with defendants, and have defended the case and resisted the claims of the complainant, as well as they could be resisted, and have held the defendants harmless from all costs, damages, and charges up to the present time.

There is no dispute about these facts, but only about the proper deduction from them.

The master says the proper deduction from those facts is that this is a commercial conspiracy to contest complainant's rights and de-

prive her of them, and delay her in them, to the fullest extent which the law of the land, the practice of the courts, and the commercial relations of the parties will permit.

The defendants contend that it is simply an agreement that G. Sidenberg & Co. should make and defendants should sell the goods, and nothing but the goods, so far as the defendants are concerned, that were sold by defendants.

The master's opinion is that an agreement of indemnity, given on demand of defendants as an inducement to resume the sale,
182 and the resumption of the infringing sales, are sufficient to raise the other conclusion as to the nature of the joint undertaking of G. Sidenberg & Co. and the defendants; certainly if taken in connection with the other circumstances of this case herein reported.

As to the fifth objection of defendants: The evidence as to the sales made by Sidenberg is substantially as follows:

Joseph C. Young, Sidenberg's general agent in Boston for sale of these and other goods, testified that he sold Sidenberg's dress protectors until February, 1879. The account that he was able to produce began March 1, 1877. The whole amount of his sales of Sidenberg's skirt protectors in Boston were about $23,000 worth the first year, the second year less, the third year less still, and the fourth year the smallest. The whole amount of sales in 1877 was from $9,000 to $10,000. They amounted in the four years' time ending February, 1879, to about $5,500. "I think I can give about the proportion the dress protector business in Boston bore to that of the whole country. My judgment was that I was doing from a quarter to a fifth of the business on these goods; from twenty per cent. to twenty-five per cent. I have no positive knowledge about it. I don't know anything about it as a matter of fact. I have never seen their books."

Miss MacDonald testified to a conversation with Sidenberg in 1876, where he made an offer of royalty, and that he told her that Sidenberg & Co. had sold hundreds of thousands of dozens. After 1879 the sale had dropped off to one hundred and fifty dozen a month from several hundred dozen a month.

From this evidence, uncontrolled, the master believed it to
183 be proved that the production and sales of Sidenberg was at least two hundred thousand dozen, and so found, and so does find as a fact.

It is true that defendants objected to all the evidence tending to show the amount of Sidenberg's manufacture, except such as related to the goods which actually passed through the defendants' hands.

As to the sixth objection: The master has already reported, in substance, the evidence which induced him to find the quantity of goods manufactured and sold by Sidenberg. As to the measure of damages, it depends upon the consideration of the money received upon the license to Watson. This license was conditioned to pay forty per cent. of the profits of the business and one-half of the law expenses on the complainant's patent. The sum actually paid for law expenses, together with forty per cent. of the profits, amounts to

an average payment of twenty-five cents a dozen on the goods manufactured and sold by Watson during some seven months before his failure; and the master assumes this as the measure of damages rather than the fifty cents profit made by the dealer, or the profits which Miss MacDonald assumes she could have made had she had a monopoly of the manufacture. It is the least sum that could have been taken from any evidence in this case. And it appeared that complainant had derived very little profit from her patent, and that the sales of goods covered by it and from which infringers profited have been very large. The infringements were very numerous by many manufacturers, and very many kinds and styles of infringing goods were generally dealt in by retailers all over the country.

As to the seventh request of defendants: The master finds as a fact that the complainant brought suit against G. Sidenberg & Co.
184 in the southern district of New York, in September, 1879, for alleged infringement of her patent, by the manufacture and sale of the Day skirt protectors, here in controversy, in which suit a preliminary injunction was obtained, but which suit has never been brought to final hearing, and is still pending.

This appeared from Miss MacDonald's cross-examination, but was not proved by production of records and papers in the suit.

As to the eighth objection of defendants: Defendants objected at the outset to all evidence offered on behalf of the complainant relating to or showing manufacture and sale by Sidenberg & Co. of skirt protectors other than those sold by defendants, as incompetent and immaterial in this accounting; and this objection was saved by the master as applicable to all such evidence offered on behalf of complainant during the accounting; and an exception to the ruling of the master was duly taken by defendants.

As to the ninth objection of defendants: The master is aware that increase of damages is a matter entirely within the discretion of the court; and he is also aware that by the order of reference he was directed "to report the profits which the defendants have received or made or which have accrued to them from their infringement by the manufacture, use, or sale of the improvement described and secured by letters patent at any and all times since the date thereof; and in addition thereto the damages which complainant has sustained thereby."

He is also aware that under the ruling of the Supreme Court the expenses of obtaining an adjudication on a patent are not a proper element of damage in a suit at law.

But on a reference in a suit in equity it seems to be proper, with or without a motion by complainant, for the master to call
185 the attention of the court to the fact that certain heavy expenses have been incurred in the litigation, which are necessarily to be taken out of the strictly legal damages found and approved by the court, which strictly legal damages should be given to the complainant, if possible, complete and clear, equitably and fairly, without any deduction on account of the expense of collecting them.

Testimony having been given as to the amount of this expense,

it seemed but fair that the attention of the court should be called to it by a recommendation, not that an arbitrary, conventional rule of the statute authorizing the trebling of damages should be followed, but that a substantial allowance for expenses of litigation should be stated, and the recommendation made that this allowance—less than one-fourth of the amount which the court is entitled to add under the statute—should be made.

This seemed particularly proper in this case, where the defendants, after notice of one adjudication in this very circuit, are lending their name and their position to an infringing manufacturer to fight a patent in a dealer's name for his own complete release if he succeeds, but with the contention of limiting the recovery, if the complainant prevails, to the profits of a single dealer and incomputable damages.

It was for this reason that the court's attention was called to the expense incurred by the complainant in this litigation, and the recommendation was made to increase the damages sufficiently to reimburse her for her expenses.

186 After the making of the foregoing report, defendants filed the following additional request:

Additional Request of Defendants.

10. The defendants request the master to report that about the beginning of the year 1876 the complainant practically ceased to manufacture plaited or fluted skirt protectors, and has since manufactured only skirt protectors consisting of a plain band of flexible water-proofed material, having attached to the lower edge thereof a comparatively thick and narrow strip of India-rubber, with indented lines extending across the rubber strip from side to side, as shown in "Exhibit MacDonald Protector;" and if the master shall decline so to do, they request him to report to the court all the evidence before him relating to or showing the kinds of skirt protectors manufactured by or for the complainant.

By their Solicitors, BROWNE, HOLMES & BROWNE.

Upon the foregoing request the master reports:

That the complainant, after the conclusion of work done under the contract with Watson—which event took place in the early part of 1876—ceased to manufacture skirt protectors which were plaited or fluted by doubling or folding the material back upon itself, and since that time has manufactured skirt protectors constructed of a plain band of flexible water-proof material, to the lower edge of which a thick and narrow strip of India-rubber was attached—which last-named thick and narrow strip was of varying thickness—lines of corrugations extending across the same perpendicularly, and subdividing it into sections about half an inch in width, which sections are divided from each other by lines indented in the India-rubber of about the width that the plaits would be separated
187 from each other, in case a thin rubber cloth had been used

to make the outer edge, and had been plaited or ruffled upon the band of water-proof above referred to.

The specimen of the later MacDonald protector was substantially like "MacDonald Protector, December 24, 1880," scheduled in this case as "E 26."

The master understands in this case, under the opinion of the court, that the corrugation or plaiting of the water-proof material, or of the binding thereof, is immaterial, and he also understands that if it be material, as providing a certain degree of jointed flexibility to the edge of the protector, that that jointed flexibility is secured in the thickened edge of the MacDonald protector of December 24, 1880, by subdividing it into sections of about three-eighths of an inch wide, separated from each other by narrow indented lines in the vicinity of the sixty-fourth of an inch wide in said "Exhibit MacDonald E 26," and that these indentations would also, if placed under a plaited edging to a skirt, give a uniform appearance to the lower edge of the skirt, conforming the protector with the edge of the trimming plaiting.

And also, after making the foregoing report, complainant filed the following paper:

JUNE 8, 1881.

To Thomas William Clarke, Esq., master in chancery:

The complainant further excepts to the master's report in this, that the master has taken twenty-five cents a dozen as the measure of damages, including profits, which is the lowest sum the complainant ever realized from any licensed manufacturer, and that license being really a partnership transaction under a contract, and her profits diminished by the failure of her copartner and the failure of the enterprise, not due to the unprofitableness of making and selling the skirt protectors, but due to other causes affecting the part-
188 ner alone, and also diminished by a failure of the necessary funds to defend the patent, instead of one dollar and fifty cents a dozen, which the master finds was the average profits made by her when she was making them herself by hand, with the added fact that they could be made, and were afterwards made, much cheaper by machinery, alleges that the measure of damages should be a much larger sum—that is to say, the sum of one dollar a dozen, which the master has found was an average manufacturer's and seller's profit.

Respectfully, yours, BENJ. F. BUTLER,
Of Counsel.

The master comments upon the last objection of the complainant as follows:

He did take 25 cents a dozen as the measure of damages in this case, but not as the measure of damages, including profits. The profits on the sales made by defendants are assessed separately, as will appear by reference to previous pages of the master's report.

As the master understands it, profits are the benefit which defend-

ants received from the infringement. Damages are the injury which complainant suffered from the infringement.

The damages are to be assessed, if possible, according to some scale determined by a license fee, or something analogous to a license fee. It is not doubtful that 25 cents a dozen was the least benefit that complainant ever received from any licensed manufacturer.

The master does not concede the proposition that the license to Watson was really a partnership transaction. The words in the license are that Watson agreed "to pay monthly to said Helen M. MacDonald, or her agent or attorney, 40 per cent. of the net profits arising from the sale of said skirt protectors, and to guarantee the payment of the same to said MacDonald free from all loss by
189 bad debts. * * * And the said Watson also agrees to assume and pay one-half of the cost of any and all suits brought against infringers of said patent during the continuance of this agreement."

A copy of the Watson agreement is annexed to this report.

The master does not consider that these provisions created a partnership, but that, by a proper construction of the agreement, the licensee was to pay a sum equal to 40 per cent. on the net profits, increased by a sum equal to one-half the expenses of litigation.

And this view seems to be, on understanding the language of the agreement, confirmed by the fact that Watson agreed to manufacture the protector, and that the cost and expense of manufacture and of placing the same upon the market was to be borne entirely and solely by said E. M. Watson, and that Watson was to bear the loss by bad debts, and that Watson was to have the sole and exclusive right to manufacture.

And so, in the opinion of the master, the document is a license for a variable license fee, measurable by the profits, and not a partnership.

It is true that the payment to Miss MacDonald by Watson was diminished by his failure, and that this diminution was not due to the unprofitableness of making and selling these skirt protectors, but to other causes.

It may or may not be true that the profitable results of the Watson contract were diminished by the failure of the necessary funds to defend the patent. The master has no evidence upon that subject applicable to the time the contract existed. After it was ended, of course Miss MacDonald was embarrassed in her litigation
190 for lack of a person to pay half the expense of litigation and a royalty to enable her to pay the other half.

It is also true that the evidence shows that Miss MacDonald made about $1.25 a dozen on an average when she was manufacturing alone by hand.

And it is also true that skirt protectors could be made, and were afterwards made, cheaper by machinery than they were by hand.

It is true also that the master has found that the average of manufacturers' profit was 50 cents a dozen, and the seller's profit was 50 cents a dozen, and that the two combined would make a profit of a dollar a dozen.

But this profit realized by the manufacturer and dealer is not necessarily a damage to the complainant. The true measure of damages, as it seems to the master, is not the profit that she might have made, or the profit that other people did make, from the use of her patent, but the amount which she would have received had they worked under a license substantially like the Watson license—and this amount the master believes would have been 25 cents a dozen.

If she had received 25 cents a dozen on all the goods manufactured, the master believes that she would have received from Sidenberg alone $50,000, according to the evidence before him. And had she been paid that royalty under an agreement it would have been, of course, a matter of indifference how much Sidenberg made on the goods and how much the seller made.

At the rate stipulated by Watson, 40 per cent. of the net profits, she would have received from Sidenberg at least $40,000 and half the expense of litigation, amounting to $12,500 more, or $52,500 in all.

This amount does not vary greatly from the amount as-
191 sessable under the master's previous finding against the defendants on account of the Sidenberg manufacture, it being but 5 per cent. more than has been reported by the master. And the master is of opinion, under the circumstances, that the recommendations already made do substantial justice to the complainant, as it leaves her free to collect from other infringers than Sidenberg, or his vendees, the balance of the worth of her patent.

In case the master is wrong in this assessment of damages, the assessment can easily be corrected by adding to Schedule B $29.52, in case the measure of damages should be 50 cents a dozen; or $78.56, in case the measure of damages should be $1 a dozen; or $147.60, in case the damages should be $1.50 a dozen; and by adding to Schedule C $50,000, if the measure of damages should be determined to be 50 cents a dozen; or $150,000, if the measure of damages should be decided to be $1 a dozen; or $250,000, if the measure of damages should be decided to be $1.50 a dozen; and also by adding to the Master's Schedule D the increments of Schedules B and C, above stated.

But the master does not recommend this addition to be made.

THOS. WM. CLARKE, *Master.*

Complainant's Charge.

And now comes Helen M. MacDonald, the complainant in said cause, and gives the master to be informed that having examined the account of sales of the articles covered by her patent, furnished by the defendants, Shepard, Norwell & Co., she believes the same to be erroneous, illusory, and insufficient, in these particulars:

First. Said account does not give any designation by which the complainant can detect the kind of skirt protectors the de-
192 fendant sold, and, although she requested them so to do before the master, they have furnished no specimens of exhibits of the kind of skirt protectors they sold; and this fact becomes very

material in ascertaining the profits and damages, because the different articles were sold at different times, at different prices, much higher at one time than another.

Second. There is no exhibit of the prices at which said articles were sold by them at retail.

Third. That they returned no account of sales since May 6, 1879, while, in truth and in fact, they have sold up to to-day.

Fourth. They have given account only of the goods that they bought, and have accounted for the sales only by showing how many they have sold, whereas, in truth and in fact, they have received goods in other ways and in other forms.

Fifth. That they have given no accounts of profits made by them at retail, and they claim to have kept no account upon their books, and they should therefore be held to the highest price that such goods have sold at retail.

Therefore said MacDonald surcharges and falsifies the account in the above particulars.

And the complainant, further complaining, informs the master that said Shepard, Norwell & Co. have, ever since the issue of her said patent, been engaged in the sale of said skirt protectors, in infringement of her patent; that they have done this with full notice from time to time of her claims under said patent, and they have done it since they were informed of the decision of this court in the case of MacDonald *v.* Blackmar, sustaining said patent; that they have continued to sell, notwithstanding the injunction upon them, and that in all their acts and doings in this behalf they have acted under an agreement to be indemnified against the consequences of their acts, and the damages caused to this complainant thereby, by G. Sidenberg & Co., of New York, who have been wilful infringers of said complainant's patent, having had it brought to their notice from the beginning, who have been making and vending, by agreement to indemnify, vast quantities of said skirt protectors,

in infringement of said complainant's patent, and that
193 said defendants are indemnified by said Sidenberg & Co.

And that said Sidenberg & Co. have taken upon themselves the burden of the defence in this case, have employed counsel, and are now employing counsel in this hearing; and that the said defendants never have employed counsel, and that the whole litigation as against this complainant has been carried on by Sidenberg & Co., and not otherwise, and that these defendants have sold inferior and imperfect goods in infringement of the patent of this complainant in great quantities and at very low prices, whereby the prices of the goods of this complainant have been brought down in the market, so that she has been unable to sell her goods in any great quantity, or, whenever able to sell them, at very small prices, without profit. And they have also sold large quantities of imitation goods, claiming them to be water-proof, when in fact they were not water-proof, by which the market was so interfered with, and the goods rendered so undesirable, that the sale of them, although dresses of ladies are still worn long in the streets and need the skirt protector, that the sale of the same has substantially ceased.

All of which actions and doings are contrary to equity and good conscience.

Wherefore she claims, in addition to any profits said defendants have made, all the profits which she ought to, and might, have made in the premises as damages.

HELEN MARIE MACDONALD.

Defendants' Discharge.

The respondents, not waiving, but reserving, all objections to the complainants' charge for insufficiency and uncertainty by way of discharge, say:

1. That their said account is true, full, and correct to the best of their knowledge, information, and belief.

2. That on receipt of notice from the complainant that the sale of certain goods by these respondents was in violation of her rights these respondents notified said firm of G. Sidenberg & Co., vendors of said goods to these respondents thereof, and said Sidenberg & Co., having consulted counsel, as these respondents are informed and believe, and being advised that the sale of said goods was not a violation of the complainant's said rights, so informed these respondents, and agreed to indemnify these respondents for costs and damages, if any, arising from any attempted enforcement by said complainant of her said alleged claim against these respondents, and in pursuance of said agreement said Sidenberg & Co. have employed counsel to defend this suit. That these respondents have sold none of said goods since the service or notice of the injunction issued in this cause, nor except in the belief that they had a right so to do.

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3. That these respondents have used, and are now using, every endeavor, as they have repeatedly informed the master and the complainant, to obtain and produce samples of the said goods sold by them, and will produce the same as soon as obtained.

4. That in obedience to the master's order herein, but under protest, these respondents in their said account included all skirt protectors and other articles of like nature sold by them, insisting that many of the goods so included were not goods infringing complainant's said patent, and that all goods not so infringing should be stricken from said account and not included in any assessment of profits or damages herein; and they further say that they will, as soon as the same can be definitely ascertained and samples obtained, and forthwith move the master so to strike out said non-infringing goods; but these respondents are unable as yet to specify said non-infringing goods, and pray leave so to do, and so to move hereafter.

5. These respondents deny that the complainant has suffered, or is entitled to recover herein, any damages whatever by reason of the acts of these respondents.

By their Solicitors, BROWNE, HOLMES & BROWNE.

195 *Watson Agreement.*

Articles of agreement made this tenth day of November, A. D. 1874, by and between Helen Marie MacDonald, of Lowell, Massachusetts, of the first part, and Ebenezer M. Watson, of Boston, of the second part, witnesseth:

That whereas said H. M. MacDonald has invented an "improvement in dress protectors," for which she has obtained letters patent of the United States of date September 29, 1874, No. 125,534; and whereas said E. M. Watson is desirous of manufacturing and selling the same, now this agreement witnesseth: That the said H. M. Watson, in consideration of one dollar and other good and valuable considerations to him paid by said H. M. MacDonald, agrees to manufacture said patented skirt protector, in such form and quality and at such prices as the said parties may mutually agree; and the cost and expense of manufacture and of placing the same upon the market to be borne entirely and solely by said E. M. Watson.

And said E. M. Watson agrees to pay monthly, from the first to the tenth of each and every month from and after the date hereof, to said H. M. MacDonald, or her agent or attorney, forty per cent. of the net profits arising from the sale of said skirt protector, and to guarantee the payment of the same to said MacDonald free from all loss by bad debts. The said Watson agrees that said H. M. MacDonald shall have full and free access to all books, accounts, bills, and other evidence of the cost of the manufacture of said goods during the existence of this agreement. And the said Watson also agrees to assume and pay one-half of the cost of any and all suits brought againgt infringers of said patent during the continuance of this agreement. Said MacDonald agrees, in consideration of said agreement of said Watson, that said Watson shall have the sole and exclusive right to manufacture and sell said patented article throughout the United States and the Territories thereof: Provided, that if said Watson shall make or sell any protectors in any form or at any prices detrimental to the interest of said MacDonald, this
196 contract shall cease, become void, and of no effect; this agreement to continue in force five years, and for such further time as the said parties shall mutually agree.

In witness whereof the said parties have hereunto set their hands and seals, the day and year first above written.

E. M. WATSON. [SEAL.]
HELEN M. MACDONALD. [SEAL.]

In presence of—
GEO. E. BETTON.

Know all men by these presents, that I, Ebenezer M. Watson, of Boston, in the county of Suffolk, for good and valuable consideration, do hereby release and discharge all my right, title, and interest in and to the above contract, to Helen M. MacDonald, of said Boston and county aforesaid; and the said MacDonald hereby releases to the said Watson the right to royalty in the manufactured articles

known as skirt protectors, which appear in the assets of said Watson; and he may dispose of the stock now on hand; and upon payment of twenty per cent. of her claim against said Watson of $179, all matters between them to be considered settled.

EBENEZER M. WATSON. [SEAL.]
HELEN M. MACDONALD. [SEAL.]

Boston, April 6, 1876.

Master's Schedule No. 1.

We, the undersigned, copartners in the firm of G. Sidenburg & Co., of New York, in consideration of the purchase of Day's dress protector from us by the firm of Lewis Coleman & Co., of Boston, do hereby agree to indemnify and save said Lewis Coleman & Co., and each member thereof, harmless from all loss, damage, costs, and expenses whatsoever which they may incur or suffer by reason or on account of their purchasing, selling, or offering to sell said dress protector, purchased of or received from us, or by reason or on account of their receiving, keeping, or dealing in the same; and we
197 agree that if any suit or suits shall be begun or brought against said firm of Lewis Coleman & Co., or any member thereof, by reason or on account of their purchasing, selling, or offering to sell said dress protector, or receiving, keeping, or dealing in the same, we will defend said suit or suits at our own expense, and will pay all such damages, costs, and sums of money as said Lewis Coleman & Co., or either of them, may be ordered or decreed to pay therein, and all expenses, whether for counsel's fees or otherwise, which may be incurred in the defence thereof.

It being understood, however, by us and by the firm of Lewis Coleman & Co. that we may terminate this contract of guarantee and indemnity at any time by giving written notice of our desire to do so to said Lewis Coleman & Co., and that immediately after the receipt of such notice this contract shall terminate as to all dress protectors purchased of us after said notice.

Witnesss our hands and seals this twenty-fourth day of October, 1878.

GUSTAVUS SIDENBERG.
HENRY SIDENBERG.
RICHARD SIDENBERG.

In presence of—
WM. E. WEIGELE.

198 *Complainant's Exceptions to Master's Report.* [*Filed Oct.* 20, 1881, *by Consent.*]

Circuit Court of the United States, District of Massachusetts. In Equity.

HELEN M. MACDONALD
v.
JOHN SHEPARD *et al.*
} No. 1775.

1. It appearing that Sidenberg & Co. were actual defendants and indemnified the party, the master should have ordered the production of their books, as it appears that first account sworn to and rendered by the party as to the quantity of protectors sold was furnished them bp Sidenberg & Co., and made on the very paper sent, afterwards found to be untrue.

Master's Report, p. 25.

2. That the master found that the transaction with Watson was a license, and that the money received by plaintiff fixed the amount of royalty (p. 25), when the master ought to have found the transaction in the nature of a partnership doing business depending upon the profits. And this appears because from agreement made with Watson, copy of which is annexed to report (p. 41); and also master found that actual profits of seller and maker of the patented article were fifty cents for each per dozen (pp. 13 and 36).

That the master should have considered upon question of damages the fact that defendants sold an inferior article, and thereby broke down the market. He should have taken this into the consideration of damages (p. 16).

199 4. Because the master has not taken the true measure of damages or the true measure of actual profits.

BENJ. F. BUTLER,
Of Counsel for Complainant.

Defendants' Exceptions to Master's Report. [*Filed Aug.* 15, 1881.]

The defendants except to the report of the master herein—

1. For that the master has found damages against the defendants to an amount exceeding twenty dollars, whereas under the Constitution and laws of the United States it was not competent for the master in this case to find damages exceeding twenty dollars.

2. For that the master has reported the defendants liable to the complainant for all the damages to her caused by reason of the manufacture and sale of all the Day skirt protectors manufactured and sold by G. Sidenberg & Co., whereas the master, on the law and the evidence, should have reported that the defendants were only liable, if at all, for the damage caused to the complainant by the sale of infringing skirt protectors sold by the defendants.

3. For that the master, contrary to the law and evidence, has reported that the defendants and G. Sidenberg & Co. were engaged in "a commercial conspiracy to beat" the complainant's patent, and "to contest her rights, and deprive her of them, and delay her in

them," and were joint trespassers upon the rights of the complainant as to all the Day skirt protectors manufactured and sold by said G. Sidenberg & Co., whether sold to or by the defendants or not; whereas the master should have found, on the law and evidence, that the defendants had no interest in or control over the business of said G. Sidenberg & Co., and that their only connection with them was to buy goods of them, including skirt protectors, as of any other manufacturer or dealer, and resell the goods so bought on their own account, save that upon notification by the complainant, after they had been selling skirt protectors bought of G.
200 Sidenberg & Co. for a considerable time, that such protectors infringed her patent, they so notified G. Sidenberg & Co., who thereupon agreed to indemnify the defendants against damages and costs by reason of the sale of such skirt protectors; and the defendants continued from time to time to buy of said G. Sidenberg & Co. and resell such skirt protectors, and that they were not joint trespassers as aforesaid with G. Sidenberg & Co. upon the rights of the complainant, nor liable as such.

4. For that the master, contrary to the evidence, and upon incompetent evidence, has found that the total number of infringing skirt protectors manufactured and sold by G. Sidenberg & Co. was 200,000 dozen; whereas the master should have found and reported that there was no competent evidence before him showing the number of such skirt protectors manufactered and sold by G. Sidenberg & Co.

5. For that the master, contrary to the law and evidence, has found against the defendants the damages to the complainant by reason of the manufacture and sale of infringing skirt protectors at twenty-five cents per dozen, or $50,029.52 in all; whereas he should have found and reported that no damages had been proved.

6. For that the master, against the defendants' objection, admitted and considered and acted upon incompetent and immaterial evidence offered on behalf of the complainant, to wit, evidence relating to the manufacture and sale by G. Sidenberg & Co. of Day skirt protectors other than those sold by them to the defendants, and the damages to the complainant by reason of such manufacture and sale by G. Sidenberg & Co.

By their Solicitors, BROWNE, HOLMES & BROWNE.

201 UNITED STATES OF AMERICA, } *ss:*
Massachusetts District, }

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, within the first judicial circuit, certify that the foregoing is a true copy of the report of the master, filed on the sixteenth day of July, A. D. 1881, in the cause of Helen M. Macdonald, complainant, *v.* John Shepard *et al.*, to which copy are annexed true copies of the exceptions filed by both parties to said report in said cause in said circuit court determined.

And I further certify that the volume entitled Vol. II, master's report and exceptions thereto, and one accompanying volume having

my certificate of even date herewith thereto annexed, entitled Vol. I, pleadings and evidence, decree, and opinion of court, together contain a true copy of the record and all proceedings of said circuit court in said cause.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Boston, in said district, this seventh day of October, A. D. 1882, and of the Independence of the United States the one hundred and seventh.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

Endorsed on cover: Massachusetts C. C. U. S. No. 122. Edward C. Carrigan, administrator of Helen M. Macdonald, dec'd, appellant, *vs.* John Shepard, Henry Norwell, and Robert Ferguson, as Shepard, Norwell & Company. No. 123. John Shepard, Henry Norwell, and Robert Ferguson, as Shepard, Norwell & Company, appellants, *vs.* Edward C. Carrigan, administrator of Helen M. Macdonald, deceased. Filed 16th October, 1882.

Complainant's Exhibit O.

R. E. S., *Examiner, etc.*

DEPARTMENT OF THE INTERIOR.

U. S. PATENT OFFICE.

To all persons to whom these presents shall come, GREETING:

This is to certify that the annexed is a true copy from the files of this office of the file wrapper and contents, in the matter of Letters Patent granted Helen Marie Macdonald.

Dated September 29th, 1874. No. 155,534. For Imp't in Dress Protectors.

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-ninth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

W. H. DOOLITTLE,
Acting Commissioner.

To the Commissioner of Patents:

The petition of Helen Marie Macdonald, of Lowell, in the county of Middlesex, and the State of Massachusetts, respectfully represents:

That your petitioner has invented a new and improved article for protecting ladies' dress skirts from being damaged by contact with streets and sidewalks, and which she verily believes has not been known or used prior to the invention thereof by your petitioner.

She therefore prays that Letters Patent of the United States may be granted to her therefor, for the term of seven years, vesting in her, and her legal representatives, the exclusive right to the same during said term, upon the terms and conditions expressed in the Act of Congress in that case made and provided, she having paid fifteen dollars into the Treasury, and complied with the other provisions of said Act.

HELEN MARIE MACDONALD.

SPECIFICATION.

To all whom it may concern:

Be it known that I, Helen Marie Macdonald, of Lowell, in the county of Middlesex, and State of Massachusetts, have invented a new and improved article for protecting ladies' dress skirts from damage, by contact with the streets and sidewalks.

My invention consists of a strip of enameled muslin from two to four inches wide, which may be covered with any dress material, such as silk, cashmere, alpaca, armure, or tamise cloth; it is then formed in pleats, and bound across the top (like samples), said pleats being held in place by one row of ma-

chine stitching through the center. It is then ready to be sewed in the dress skirt.

My invention protects the dress from being cut or damaged by contact with earth, or brick or concrete pavements and sidewalks; said invention being impervious to moisture; it also protects the skirt from being soiled or damaged by mud or dampness of street crossings, sidewalks, &c.

It also forms a very neat trimming, and improves the hanging of the skirt.

HELEN MARIE MACDONALD.

LOWELL, Mass., May 6, 1873.

Witnesses:
J. N. MARSHALL.
A. D. PUFFER.

(Endorsed.)
HELEN M. MACDONALD.
Pat. May 10, 1873.
619

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Cancelled May 13, 1873.

OATH.

COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } ss.:

On this sixth day of May, A. D. 1873, before me, the subscriber, a Justice of the Peace, personally appeared the within named Helen Marie Macdonald, and made oath that she verily believes herself to be the original and first inventor of the mode herein described, for the protection of ladies' dress skirts from damage by contact with streets and sidewalks, and that she does not know or believe the same was ever before known or used, and that she is a citizen of the United States.

J. N. MARSHALL,
Justice of the Peace.

(Endorsed.)
HELEN M. MACDONALD.
Oath May 10, 1873.
619

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Patent Office
May 10, 1873,
U. S. A.

LOWELL, May 10th, 1873.

To the Commissioner of Patents:

Please set aside the specification which is dated May 6th, and witnessed by J. N. Marshall and A. D. Puffer, and substitute one

which I will send this day, and which is witnessed by Laurin Martin and Geo. J. Carney.

HELEN MARIE MACDONALD.

(Endorsed.)

HELEN M. MACDONALD.

Letter May 13, 1873.

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To the Commissioner of Patents:

Your petitioner, a resident of Lowell, County of Middlesex, and State of Massachusetts, prays that Letters Patent may be granted to her for the invention set forth in the annexed specification, said Letters Patent to be for the term of seven years.

HELEN MARIE MACDONALD.

Specification describing a certain improvement in protecting the lower edge of dresses, cloaks, and other articles of wearing apparel, invented by HELEN M. MACDONALD, *of Lowell, State of Massachusetts.*

My invention consists in protecting the lower edge of dresses and other garments, by affixing thereto a portion of waterproofed material, or in waterproofing the material itself; and I claim as my invention the use of waterproofed material, in whatsoever form it now exists or may hereafter exist, for the purpose of protecting the lower edge of all garments from wear and soiling, either from friction or moisture, and refer to the enclosed samples as substantially representing my invention.

HELEN MARIE MACDONALD.

Witnesses:

LURIN MARTIN,
GEORGE J. CARNEY.

STATE OF MASSACHUSETTS, *County of Middlesex*, } ss.:

HELEN M. MACDONALD, the above named petitioner, being duly sworn, deposes and says, that she verily believes herself to be the original and first inventor of the improvement in dress protectors, described and claimed in the foregoing specification; that she does not know and does not believe that the same was

ever before known or used, and that she is a citizen of the United States.

HELEN MARIE MACDONALD.

Sworn to and subscribed before me, this 10th day of May, 1873,

GEORGE J. CARNEY,
[L.S.] *Notary Public.*

(Endorsed.)

HELEN MARIE MACDONALD.
Specte., May 13th, 1873.
619

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Patent Office,
May 13, 1873,
U. S. A.

LOWELL, Mass., May 20th, 1873.

To the Commissioner of Patents:

I herewith enclose a drawing of Waterproof Skirt Protector invented by me.

Letter A. Fig. 1, represents the invention finished and ready to be sewed to the skirt. Letter A, Fig 2, represents it as applied to the skirt.

Very respectfully,
HELEN MARIE MACDONALD.

(Endorsed.)

HELEN M. MACDONALD.
Letter, May, 27th, 1873.
619

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Patent Office,
May 22, 1873,
U. S. A.

[No. 1.] EXAMINER'S ROOM No. 5.
U. S. PATENT OFFICE,
WASHINGTON, D. C., Aug. 9, 1873.

HELEN MARIE MACDONALD,
Lowell, Mass.

Your application for a patent for an improvement in skirt protectors, filed May 10th, 1873, has been examined and found to be

anticipated in the patent to James A. MacKee, No. 45,840, January 10, 1865. ("Skirts and Protectors.")

The application is therefore rejected.

H. BLANDY,
3d Assistant.

WM. BURKE,
Examiner.

(Endorsed.)
HELEN MARIE MACDONALD.
Rej. Aug. 9, 1873.
619

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LOWELL, Mass., Aug. 11th, 1873.

Commissioner of Patents.

Sir: I hereby appeal to the Examiner-in Chief from the decision of the Examiner, Room No. 5, in the matter of my application for Letters Patent for an improvement in Skirt Protectors, filed May 10th, 1873, which, on August 9th, 1873, I am advised has been rejected. The following are assigned as reasons for appeal: From a long experience in dress making, covering many years, and from the fact that on the 20th day of April, 1873, a patent was granted for Gallup's Dress Protector and Facing, an article upon which my application is a self-evident and very marked improvement. For these reasons, I respectfully decline to believe that my invention has been anticipated in a patent No. 458.40, Jan. 10th, 1865, to James S. A. Mackee, as alleged.

Very respectfully,
HELEN MARIE MACDONALD.

(Endorsed.)
Patent Office,
Aug. 14, 1873,
U. S. A.
Burke, Ex.

(No. 1.)

EXAMINER'S ROOM, No. 5,
U. S. PATENT OFFICE,
WASHINGTON, D. C., Aug. 30th, 1874.

HELEN MARIE MACDONALD,
Lowell, Mass.

In the matter of your application for patent for improvement in Skirt Protectors, filed May 10, 1873, you are hereby informed, in reply to your letter containing what you designate as reasons of appeal, that the said application is not yet in condition for appeal, not having been *twice rejected* on the same claim. You

are entitled under the "Rules" to demand a re-examination, either upon the same or an amended claim, and your best course now is to require such examination.

The case accordingly awaits your further action.

WM. BURKE,
Examiner.

(Endorsed.)
HELEN M. MACDONALD.
Letter, Aug. 30, '73.
Copy—original lost.

619

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LOWELL, Sept. 6th, 1873.

Commissioner of Patents.

Dear Sir: I have to acknowledge the receipt of letter from Room No. 5, of date Aug. 30th, in relation to my application, filed May 10th, 1873, for patent for "Skirt Supporter," to quote. Now, I have applied for a patent for a *Skirt Protector*, but not for a *Skirt Supporter*.

My application I still believe should be granted, for the reason that by means of a waterproofed fabric the edge of the skirts of dresses will be effectually protected from soiling and wearing, and from a long experience in dress making I have not known of the use of such material, and would respectfully refer to Gallup's Dress Protector and Facing, granted April 29th, 1873, to illustrate my improvement.

Pray have the matter considered at the earliest convenience of the Examiner, for I feel certain that when my improvement has been fully examined a patent will be granted me.

I regret troubling you with so small a matter, and trust you will excuse my urging the consideration of my application.

Very respectfully,
HELEN MARIE MACDONALD.

(Endorsed.)
HELEN MARIE MACDONALD.
Letter Sept. 8, 1873.

Patent Office,
Sept. 8, 1873,
U. S. A.

(No. 1.)

EXAMINER'S ROOM NO. 5,
U. S. PATENT OFFICE,
WASHINGTON, D. C., Sept. 9, 1873.

HELEN MARIE MACDONALD,
Lowell, Mass.

In reply to your letter of the 6th inst., relating to your application for a patent for an Improvement in Skirt Protectors, filed

May 10, 1873, you are again referred to the patent before cited, namely: James A. Mackee, No. 45,840, Jan'y 10, 1865, in Class of Apparel—Subdivision, "Skirts and Protectors," which, upon examination, you will see has anticipated your broad claim for a waterproof dress facing and protector. If by comparison you deem your invention to possess advantages and improvements over the above reference, you may amend your application by limiting the claim accordingly. As now presented, the application is again rejected.

H. BLANDY,
3d Asst.
App'd WM. BURKE,
Ex.

(Endorsed.)
HELEN MARIE MACDONALD,
Letter Sept. 9, '73.
619
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LOWELL, 2d Oct., 1873.

Commissioner of Patents, Washington, D. C.:

I enclose a sample of Mackee's improvement in Dress Facing (green in color); also a sample of my improvement in *Skirt Protectors* (black in color) for inspection, and I believe it will be found on examination to be worthy of being decided upon favorably.

I do not claim that waterproof material has never been used before in dress facing; but I do claim that Mackee's patent does not interfere with my petition, and, to the best of my knowledge, the raw edge as used by me has never before been employed.

Mackee's Facing *cannot* be used in the present style of gored skirts; therefore it has not been in the market since they were first imported, which is about eight years.

I desire to *amend* the *title* of the article itself, so that my claim will be for a new and novel waterproof "*Skirt and Skirt Trimming Protector.*"

I beg you to have this examined as soon as convenient, as the article will be in great demand through wet weather the coming Winter.

Respectfully,
HELEN MARIE MACDONALD.

(Endorsed.)
Appt. to Office,
Oct. 4, 1873.
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Patent Office,
Oct. 4, 1873,
U. S. A.

(No. 1.)

EXAMINER'S ROOM No. 5,
U. S. PATENT OFFICE,
WASHINGTON, D. C., Oct. 9, 1873.

HELEN MARIE MACDONALD,
Lowell, Mass.

Your application for a patent for Imp't in Dress Protectors, filed May 10. 1873, has been reconsidered with letter rec'd of Oct. 2, '73. It is herein suggested to amend the claim by substituting therefor the one enclosed in pencil notes herewith.

H. BLANDY,
3d Ass't.
App'd WM. BURKE,
Ex'r.

(Endorsed.)
H. M. Macdonald,
Letter Oct. 9, 1873.
619

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LOWELL, 13th Oct., 1873.

Commissioner of Patents:

Sir: Your letter of 9th inst. is read with many thanks.

I enclose, as suggested, an amended form of claim in relation to my Improvement in Skirt Protectors, and trust that the same may be favorably considered.

Very truly yours,
HELEN M. MACDONALD.

(Endorsed.)
Letter inclosing am't. "H,"
Oct. 14, 1873.
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Patent Office,
Oct. 14, 1873,
U. S. A.

Specification describing a certain improvement in protecting the lower edge of dresses, cloaks, and other articles of wearing apparel, invented by HELEN M. MACDONALD, *of Lowell, State of Massachusetts.*

My invention consists in protecting the lower edge of dresses and other garments by affixing thereto a portion of waterproofed or enameled material, or in waterproofing the material itself; and

I claim as a new article of manufacture a skirt facing or protector, having a plaited or fluted border bound with or composed of enameled cloth or other waterproof material, substantially as and for the purpose set forth.

Written at the bottom in red ink: "Erase and insert New Spec., Sep. 14, '74."

(Endorsed.)
H. M. MACDONALD.
Amended Spec. "H."
619

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Erased for New Spec., Sep. 4, '74.
Patent Office, Oct. 14, 1873.
U. S. A.

(No. 1.)

EXAMINER'S ROOM No. 5.
U. S. PATENT OFFICE, WASHINGTON, D. C.,
October 30, 1873.

HELEN MARIE MACDONALD,
Lowell, Mass.

Your application for Letters Patent for Imp't in Skirt Protectors, filed May 10, '73, is adjudged to interfere with the pending applications of Wm. H. Gallop, of Troy, N. Y., filed June 25, '73, care of S. J. Gordon, 34 Beach street, N. Y. City, Attorney; also James L. Hutton, of N. Y. City, filed Oct. 6, '73, care Clayton & Co., Washington, D. C., Att'ys; and M. Herbert Chase, of N. York City, filed Oct. 16, '73, care Lemuel W. Serrell, N. York City. The question of priority will be determined in conformity with the rules accompanying this. The preliminary statement demanded by Rule 53, must be sealed up and filed on or before the 20th day of Nov., 1873, with the subject of invention and name of party filing it indorsed on the envelope. *The subject matter involved in the interference is a skirt protector having a fluted or plaited waterproof border.*

H. BLANDY, 3d Ass't.
Appl. WM. BURKE, Ex.

(Endorsed,)
HELEN M. McDONALD.
Intf. Letters.
Oct. 30, 1873.
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($20 P. O. O.) LOWELL, MASS., Sept. 5th, 1874.

To the Hon. Commissioner of Patents.

SIR: Upon being advised that in the matter of the interference of Chase *vs.* Macdonald (Skirt Protectors), that your

decision is in my favor, I hasten to forward a Post Office money order for twenty dollars ($20.00), as final fee upon patent which I hope to receive soon.

Very Respectfully,
HELEN M. MACDONALD.

(Endorsed.)
PATENT OFFICE.
Sept. 9, 1874.
U. S. A.

(No. 1.)

EXAMINER'S ROOM, No. 5,
U. S. PATENT OFFICE, WASHINGTON, D. C.,
September 10, 1874.

HELEN MARIE MACDONALD,
Lowell, Mass.

In the matter of your application for a patent for an Impt. in Dress Protectors, filed May 10, 1873, the specification is not thought to be sufficiently clear and full in the description. It is therefore suggested to amend by erasing the whole of the present specification except the petition, oath and signatures, and substitute one copied from the enclosed penciled form.

H. BLANDY, 3d Ass't.

(Endorsed.)
H. M. MACDONALD,
Letter Sept. 10, 1874.
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To the Commissioner of Patents:

In the matter of my application for a patent for "Dress Protector," I hereby *amend* my specification by *erasing* the *whole* of the present specification except the petition, oath and signature, and *substituting* the enclosed.

Resp'y,
HELEN M. MACDONALD.

LOWELL, Sept. 12, 1874.

(Endorsed.)
PATENT OFFICE,
Sept. 14, 1874,
U. S. A.

Specification.

To all whom it may concern:

Be it known that I, Helen M. Macdonald, of Lowell, Mass., have invented a new and useful improvement in dress protectors, of which the following is a full and clear description, reference

being had to the accompanying drawing, forming a part of this specification.

My invention relates to protectors for the lower edge of dresses and other garments, and consists of a band or strip of fluted or plaited fabric either waterproofed itself or covered or bound with any waterproof material.

In the drawing—

Fig 1 represents a view of a detached portion of the dress protector, and Fig. 2 represents the protector as applied to the bottom of a dress skirt. A, is the plaited or fluted band, which is waterproofed or bound with waterproof material, and *a* is a heading to which it may be secured for better attachment to the garment.

Heretofore skirt protectors have been made of a plaited or fluted strip of "wiggin" or other fabric stiffened with starch, which upon becoming wet get limp, loses its shape and absorbs the dirt, besides being objectionable on account of the harsh scraping noise it makes upon the pavement.

By my improvement these objections are overcome. The waterproof protector preserves the lower edge of the dress from all moisture on the ground, retains its rigidity and proper shape, giving a graceful hang to the skirt, and can easily be cleaned.

Having thus described my invention, what I claim and desire to secure by Letters Patent is:

As a new article of manufacture, a skirt facing or protector having a fluted or plaited border bound with or composed of enameled cloth or other waterproof material substantially as and for the purpose set forth.

HELEN M. MACDONALD.

(Endorsed,)

H. M. MACDONALD,
New Spec., filed,
Sep. 14, 1874.
619,

95.

PATENT OFFICE,
Sep. 14, 1874,
U. S. A.

$10 P. O.

Disclaimer.

To the Commissioner of Patents:

Your Petitioner, Helen Marie Macdonald, of Lowell, County of Middlesex and State of Massachusetts, represents that she is the Patentee and owner of a certain Improvement in Dress Protectors for which Letters Patent of the United States were

granted to her of date *September 29th*, 1874, *No.* 155,534. That she has reason to believe that through inadvertence, accident or mistake the specification and claim of said Letters Patent are too broad, including that of which said Patentee was not the first inventor. Your Petitioner therefore hereby enters her disclaimer to that part of the claim in said specification which is in the following words, to wit:

"As a new article of manufacture a skirt *facing*," and thereby limiting said claim as follows: "As a new article of manufacture a skirt *protector* having a fluted or plaited border bound with or composed of enameled cloth or other waterproof material, substantially as and for the purpose set forth."

HELEN MARIE MACDONALD.

Witness:

GEO. E. BELTON.

BERNE, November 4th, 1874.

(Endorsed,)

PATENT OFFICE
Nov. 9th, 1874.
U. S. A.

Disclaimer,

HELEN MARIE MACDONALD.

Recorded Vol. 1, page 232.

LOWELL, Mass., Oct. 26th, 1875.

To the Hon. Commissioner of Patents:

Early in the year of 1873, I made application for Letters Patent on a waterproof skirt protector. I did not employ a patent solicitor, preferring to do the work myself. My case was neglected for a long time, probably because my papers were not properly made out. Finally others applied for patents on the same thing. An interference was declared, which I went through with, and which, of course, gave me great trouble and expense. Ultimately the patent issued to me.

During the time my case was pending, and since my patent has issued, there have been no less than *ten or twelve* patents granted on the same thing, viz.: "A waterproof skirt protector." If this is according *to law* I am willing to submit to the injustice, if not according to law I respectfully ask to have the matter investigated. I herewith enclose a sample of the latest *Invention* in that line. Is a patent to issue for this?

Will you please give this matter your attention and oblige,

Yours truly,
HELEN M. MACDONALD.

U. S. PATENT OFFICE,
Oct. 30th, 1875.

Hon. R. H. DUELL,
Commissioner.

Sir:

In compliance with your request for information in connection with the communication of H. M. Macdonald, I beg leave to state that she made application for Letters Patent for an improvement in skirt protectors, May 10th, 1873, with a claim as follows: "The use of waterproof material in whatsoever form "it now exists or may hereafter exist for the purpose of protect- "ing the lower edge of all garments from wear and soiling, "either from friction or moisture and refer to the inclosed sam- "ples as substantially representing my invention."

Apart from the vague and objectionable character of this claim it was rejected on reference to a patent granted to J. A. Mackee, Jan. 10th, 1865, whereupon she modified her application by an amendment couched in the following words: "My "invention relates to protectors for the lower edge of dresses "and other garments, and consists of a band or strip of fluted or "plaited fabric either waterproofed itself or covered or bound "with any waterproof material."

Upon this construction claim she went into interference with M. Herbert Chase and several other parties, and was awarded priority of invention.

Previous to the date of her application a large number of patents had been granted for skirt protectors involving the waterproof feature, those amongst the earliest being Lucinda Humphrey, Apr. 22, 1862, No. 35,026, Jas. A. Mackee, No. 45,840 (already cited) and S. B. De Forest, Jan. 15th, 1867, No. 61,172; accordingly Macdonald, not being deemed a foundation inventor, only those applications which came in during the pendency of her's, and that conflicted with her special construction of skirt protector, were put in interference, while those patented during such time and after the grant of Letters Patent No. 155,534, Sept. 29th, 1874, to her, were patented as independent inventions. All that was decided in the interference matter was that she anticipated Chase and the other parties in the invention of a fluted or plaited waterproof skirt protector, just what she claimed, not originally, but in modified form, after being informed of the state of art. In the trial, it is true, she testified that she put a *facing* of enameled cloth on some of her own dresses in 1861, whilst her two principal witnesses say they saw her with a skirt so faced or lined in 1863 and 1867 respectively.

Nothing but her own statement, it will be noticed, carries her invention in its broadest sense, behind that of Lucinda Humphrey, but even suppose, for the sake of argument, Macdonald held the foundation patent, it could not absolutely shut the gate to all subsequent improvements in the same line of invention.

Although patents granted for such would doubtless be tributary to the first, they could not be held in the light of piracies.

Such a patent Macdonald does not hold for the reasons above stated, and accordingly whether a patent will be granted to Milliken (a specimen of whose invention was inclosed in Macdonald's letter), depends entirely upon the fact disclosed by the examination as to novelty of construction or in the process of making.

In conclusion, as evidence of the wisdom and corectness of the office action in this matter attention is respectfully called to the disclaimer filed by H. M. Macdonald in relation to Letters Patent granted to her Sept. 29th, 1874, No. 155,534, such disclaimer being found recorded in vol. 1, page 232 of disclaimers and reading substantially as follows:

"That she has reason to believe that through inadvertence, accident or mistake, the specification and claim of said Letters Patent are too broad, including that of which the said patentee was not the first inventor. Your petitioner, therefore, hereby enters her disclaimer to that part of the claim in said specification, which is in the following words, to wit: 'As a new article of manufacture, a skirt *facing*,' and thereby limiting said claim as follows: 'As a new article of manufacture, a skirt *protector* having a fluted or plaited border bound with or composed of enamelled cloth or other waterproof material substantially as and for the purpose set forth.'"

I have the honor to be
Your obedient servant,
WILLIAM BURKE,
Examiner.

(Endorsed.)

Examiner's report, Div. of Fine Arts, Oct. 30th, 1875. Report of Examiner Burke in the case of Helen M. Macdonald, to whom Letters Patent were issued. Copy forwarded to Helen M. Macdonald, Lowell, Mass., Nov. 13th, 1875.

U. S. PATENT OFFICE.

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Application of Helen Marie Macdonald, filed June 28, 1873. Contents of this file:

1. Application.
2. Rej. Aug. 9, 1873.
3. Letter Aug. 30, 1873.
4. Letter Sept. 8, 1873.
5. Letter Sept. 9, 1873.
6. Appl't to Off. Oct. 4, 1873.
7. Letter Oct. 9, 1873.
8. Amt. "H," Oct. 14, 1873.

9. Intf. Letter Oct. 30, 1873.
10. Letter Sept. 10, 1874.
11. New Spec. Sept. 14, 1874.

Endorsed,

2 apparel,
38 Skirts and
Protectors.

(38.)

Burke · 619

Nottingham 95

1873.

No. 155,534.

Helen Marie Macdonald,

Of Lowell,
County of Middlesex,
State of Massachusetts ;
Skirt Protector.

Disclaimer filed Nov. 9, 1874.
Received May 10, 1873.
Petition " " "
Affidavit " " "
Specification " " "
Drawing June 28, 1873.
Model May 10, "
Cert. Dep.: Cash $15, May 13, 1873; $10 Nov. 9, 1874.
Add'l Fee Cert.: Cash $20, Sept 9, 1874.
Examined Sept. 26, 1874. Wm. Burke.
Issue Sept. 26, 1874. Knight.
Patented Sept. 29, 1874.
Recorded vol. page
Circular.

1873.

Rejected Aug. 9, '73.
Letter Aug. 30, '73.
Letter Sep. 9, '73.
Oct. 9, '73, Letter.
Interference Dec., Oct. 30, '73.
Ex'd H. H. Letters Sept. 10, 1874.

(Endorsed,
Imp't in Dress Protectors.)

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Deposition of Jane M. Kittredge 276

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

HELEN MARIE MACDONALD

vs.

S. M. BLACKMER ET AL.

PLEADINGS AND EVIDENCE.

For Complainant, GEORGE E. BETTON, Esq.

For Defendants, CAUSTEN BROWNE, Esq., JABEZ S. HOLMES, Esq.

BILL OF COMPLAINT.

[FILED NOVEMBER 13, 1874.]

Helen Marie Macdonald, of Lowell, in said district, brings this her bill of complaint against S. M. Blackmer and Albert A. Mandell, both of Hyde Park in said district. And thereupon your oratrix complains and says, that she being the original and first inventor of a new and useful improvement in dress protectors, fully described in the Letters Patent hereinafter mentioned, which was not known before her said invention thereof, and which had not been at the time of her application for said patent in public use or on sale more than two years, with her consent or allowance, on the twenty-ninth day of September, A. D. 1874, upon due application, did obtain Letters Patent therefor in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents of the United States, bearing date the day and year aforesaid, whereby there was secured to her, her heirs and assigns, for the term of seventeen years from and after the twenty ninth day of September, A. D. 1874, the

full and exclusive right and liberty of making, using and vending to others to be used, the said improvement in dress protectors, as by said Letters Patent, in Court to be produced, will fully appear. And your oratrix further shows, that the exclusive right and liberty aforesaid, has been, and still is, of great value and profit to your oratrix; yet the defendants, well knowing the premises, without her consent, and in violation of said Letters Patent and the rights of your oratrix, have made, sold and used, and still do make, sell and use in said district, a large number of said patented protectors, but how many your oratrix cannot state, but prays that the defendants may discover and set forth; and thereby defendants have infringed, and still do infringe, upon the exclusive rights and privileges so intended to be secured to your oratrix by the Letters Patent aforesaid. And your oratrix has requested the said defendants to desist from making, using or selling said patented protectors, and to account with and pay over to your oratrix the profits made by said defendants by reason of said unlawful making, using and selling of the same, and all damages the claimant has sustained thereby, and such additional amount of damage as the Court may see fit to order and adjudge. But now so it is, may it please your Honor, the said defendants wholly refuse so to do, contrary to equity and good conscience, and to the manifest wrong and injury of your oratrix in the premises. To the end therefore that the said defendants may, if they can, show why your oratrix should not have the relief herein prayed, and may, under oath, and according to their and each of their best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the premises; and more especially may answer, discover and set forth the number of yards or dozens of yards made, sold or used by said defendants since the date of said patent, containing said patented improvement, or any substantial part thereof; and that said defendants may be decreed to account for and pay over to your oratrix all gains and profits realized from the unlawful making, using or selling of said protectors, and all damages the complainant has sustained thereby, and such additional amount of damages as the Court may see fit to order and adjudge, and may be restrained by an injunction, to be issued out of this honorable Court, from making, selling or using any of said protectors embracing said improvement, or any substantial part thereof so patented as aforesaid; and that they may also be enjoined and restrained as aforesaid, during the pending of this suit; and for such other and further relief in the premises as the nature of the case may require and to your Honors shall seem meet. May it please your Honors to grant unto your oratrix not only a writ of injunction, conformable to the prayer of this bill, but also a writ of subpœna, to be directed to said S. M. Blackmer and Albert A. Mandell, commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to be and appear before your Honors and this honorable Court, then and there to answer unto this bill of complaint, and

to do and receive what to your Honors shall seem meet in the premises.

HELEN M. MACDONALD.

GEORGE E. BETTON,
Of Counsel.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT. BOSTON, November 9, 1874.

Then personally appeared the said Helen Marie Macdonald, and made oath that the statements in the foregoing bill of complaint, so far as made upon personal knowledge, are true; and so far as stated upon information and belief, she verily believes them to be true, before me,

JOS. F. CLARK,
Justice of the Peace.

AMENDMENT TO BILL.

[FILED BY CONSENT FEBRUARY 4, 1875.]

And now the complainant comes and moves for leave to amend said bill by inserting after the reference to complainant's patent the following statement; viz., said complainant's patent was amended by filing in the said Patent Office a "Disclaimer to that part of the claim in said specification," which is in the words following, to wit, "As a new article of manufacture, a *skirt facing*," and thereby limiting said claim as follows: "As a new article of manufacture, a *skirt protector* having a fluted or plaited border bound with or composed of enameled cloth or other waterproof material, substantially as and for the purpose set forth," which said disclaimer was dated on the 4th day of November, A. D. 1874, and filed in the said Patent Office on the ninth day of said November, and before the commencement of this suit, as by a duly attested copy of said disclaimer, in Court to be produced, will fully and at length appear.

H. M. MACDONALD,
by Attorney,
GEO. E. BETTON.

ANSWER.

[FILED JANUARY 13, 1875.]

THE ANSWER OF S. M. BLACKMER AND ALBERT A. MANDELL, RESPONDENTS TO THE BILL OF COMPLAINT OF HELEN MARIE MACDONALD, COMPLAINANT.

These respondents, for answer to the bill of complaint or such parts thereof as they are advised are material to be answered, jointly and severally say:

1. They admit that the complainant obtained certain Letters Patent of the United States, dated September 29, 1874, for an alleged improvement in dress protectors, as alleged in the bill.

2. They deny on information and belief that the complainant was the original or first inventor of the said alleged improvement, and on the contrary aver that the same, or a substantial and material part thereof, claimed in said patent as new, was before the complainant's alleged invention thereof known to and made, used and sold by the following named persons at the following-named places; to wit, by G. Sidenburg & Co., of and at the City of New York; by J. A Bluxome & Co., of and at the City of New York; by W. Fraser & Co., of and at the City of New York; by John Harrington & Co., of and at the City of New York; by M. H. Chase, of and at the City of New York; by Cook, Valentine & Co., of and at the City of New York; by A. T. Stewart & Co., Aitken & Miller, James Morrison, Calhoun, Robbins & Co. and J. P. Morton, all of and at the City of New York; by Carrie E. King, of and at the City of Boston; by William Clapp, of and at the City of Boston, and by A. A. Mandell, of and at the City of Boston; and described and represented in Letters Patent of the United States granted to James A. Mackie, January 10, 1865.

3. They aver, on information and belief, that for more than two years before the complainant's application for the said patent, the said alleged invention was in public use and on sale with her consent and allowance.

4. They submit that by reason of the facts hereinbefore alleged the said Letters Patent are void.

5. They deny that they have committed any infringement of any valid Letters Patent, as alleged in the bill.

6. They submit that the complainant is not entitled to the discovery or injunction or account or profits or damages claimed in the bill, and pray to be hence dismissed, with their costs.

SETH M. BLACKMER.
ALBERT A. MANDELL.

UNITED STATES OF AMERICA,

STATE AND DISTRICT OF MASSACHUSETTS, SUFFOLK, } ss.:

JANUARY 13, 1875.

Personally appeared S. M. Blackmer and Albert A. Mandell, and severally made oath that they had heard read the above answer by them subscribed, and that the statements therein made as of their own knowledge are true, and so far as they are made on information and belief, that they verily believe the same to be true, before me,

N. AUSTIN PARKS,
Notary Public.

REPLICATION.

[FILED FEBRUARY 4, 1875.]

This repliant saving and reserving all and all manner of advantge of exception to the manifold insufficiencies of said answer, for replication saith, she will aver and prove this bill to be true, certain and sufficient to be answered, and that defendants' answer is uncertain, untrue and insufficient to be replied to, without this, that any other matter or thing whatsoever in said answer material or effectual in the law to be replied unto, confessed and avoided, traversed or denied is true. All which this repliant will aver and prove as by the Court directed, and prays as in and by said bill she has already prayed.

By her Solicitor,
GEO. E. BETTON.

COMPLAINANT'S EXHIBIT 1.

No. 155,534.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come.

Whereas Helen Marie Macdonald, of Lowell, Massachusetts, has presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in dress protectors, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided: and

Whereas upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law:

Now, therefore, these Letters Patent are to grant unto the said Helen Marie Macdonald, her heirs or assigns, for the term of seventeen years from the twenty-ninth day of September, one thousand eight hundred and seventy-four, the exclusive right to make, use and vend the said invention throughout the United States and the territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of the independence of the United States of America the ninety-ninth.

B. R. OWEN,
Acting Secretary of the Interior.

[SEAL.]

Countersigned:
M. D. LEGGETT,
Commissioner of Patents.

UNITED STATES PATENT OFFICE.

HELEN MARIE MACDONALD, OF LOWELL, MASSACHUSETTS.

IMPROVEMENT IN DRESS PROTECTORS.

Specification forming part of Letters Patent No. 155,534, *dated September* 29, 1874; *application filed May* 10, 1873.

To all whom it may concern:

Be it known that I, Helen M. Macdonald, of Lowell, Massachusetts, have invented a new and useful Improvement in Dress Protectors, of which the following is a full and clear description, reference being had to the accompanying drawing forming a part this specification:

My invention relates to protectors for the lower edge of dresses and other garments, and consists of a band or strip of fluted or plaited fabric, either waterproof itself or covered or bound with any waterproof material.

In the drawing, Figure 1 represents a view of a detached portion of the dress protector, and Figure 2 represents the protector as applied to the bottom of the dress-skirt.

A is the plaited or fluted band, which is waterproofed or bound with waterproof material, and *a* is a heading to which it may be secured for better attachment to the garment.

Heretofore skirt protectors have been made of a plaited or fluted strip of "wiggan" or other fabric, stiffened with starch, which upon becoming wet gets limp, loses its shape, and absorbs the dirt, besides being objectionable on account of the harsh, scraping noise it makes upon the pavement.

By my improvement these objections are overcome. The waterproof protector preserves the lower edge of the dress from all moisture on the ground, retains its rigidity and proper shape, giving a graceful hang to the skirt, and can easily be cleaned.

Having thus described my invention, what I claim and desire to secure by Letters Patent is:

As a new article of manufacture, a skirt facing or protector, having a fluted or plaited border bound with or composed of enameled cloth or other waterproof material, substantially as and for the purpose set forth.

HELEN MARIE MACDONALD.

Witnesses:
LAURIN MARTIN,
GEO. J. CARNEY.

COMPLAINANT'S EXHIBIT 2.

DISCLAIMER.

[FILED NOVEMBER 9, 1874.]

To the Commissioner of Patents:

Your petitioner, Helen Marie Macdonald, of Lowell, County of Middlesex and State of Massachusetts, represents that she is

the patentee and owner of a certain Improvement in Dress Protectors, for which Letters Patent of the United States were granted to her of date September 29, 1874, No. 155,534.

That she has reason to believe that through inadvertence, accident or mistake, the specification and claim of said Letters Patent are too broad, including that of which said patentee was not the first inventor. Your petitioner therefor hereby enters her disclaimer to that part of the claim in said specification which is in the following words, to wit:

"As a new article of manufacture a *skirt facing*," and thereby limiting said claim as follows: "As a new article of manufacture a skirt *protector*, having a fluted or plaited border bound with or composed of enameled cloth or other waterproof material, substantially and for the purpose set forth."

HELEN MARIE MACDONALD.

Witness,
GEORGE E. BETTON,
Boston, November 4, 1874.

THE UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the files of this office, of a Disclaimer filed November 9, 1874, in matter of the Letters Patent granted Helen Marie Macdonald, dated September 29, 1874, No. 155,534, for "Improvement in Dress Protectors"

In testimony whereof, I, Ellis Spear, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this first day of November, in the year of our Lord one thousand eight hundred and seventy-four, and of the independence of the United States the ninety-ninth.

ELLIS SPEAR,
[SEAL.] Acting Commissioner.

EVIDENCE FOR COMPLAINANT.

TAKEN IN PURSUANCE OF THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED.

BEFORE ME,

JOSEPH F. CLARK,
Special Examiner.

BOSTON, February 26, 1875.

Present: GEORGE E. BETTON, Esq., of Counsel for Complainant.
CAUSTEN BROWNE, Esq., of Counsel for Defendants.

Complainant's counsel offers in evidence Letters Patents of the United States granted to complainant of date 29th of September, 1874, numbered 155,534, and also Disclaimer relating to said patent, filed in Patent Office, November 9, 1874, and dated November 4, 1874.

Deposition of Carrie Hall.

Direct-examination by George E. Betton, Esq., of Counsel for Complainant.

Int. 1. State your name, age, residence and occupation?

A. Carrie Hall; age twenty; residence, 27 Phillips street, Boston; occupation, making skirt protectors.

Int. 2. How long have you been in that business, and with whom?

A. I have been about two months with Mr, Watson, and before that with Blackmer & Mandell for one year.

Int. 3. Did said Blackmer & Mandell have a manufactory for skirt protectors; if so, where was it, what street and number?

A. Yes, sir; they had; in Bedford street, Boston; don't remember the number.

Int. 4. Was it that factory that you worked?

A. Yes, sir.

Int. Please look at the exhibit now shown you, marked Complainant's Exhibit No. 3?

[Defendants' counsel admit that the Exhibit No. 3 of complainant's represents articles sold by them between the date of complainant's patent and the filing of this bill.]

Carrie Hall.

Attest: Jos. F. Clark,
Special Examiner.

Deposition of John O. Prince.

Direct-examination by George E. Betton, Esq., of Counsel for Complainant.

Int. 1. What is your name, age, occupation and residence?

A. John O. Prince; age, thirty-two; occupation, clerk with E. M. Watson & Co.; my residence is Boston.

Int. 2. Have you been engaged in any business which includes the purchase or sale of dress protectors; if yea, when and for how long?

A. I have had to do with skirt protectors since the spring of 1873.

Int. 3. Is the firm you are now with engaged in making skirt protectors? If yea, please look at Complainant's Exhibit No. 4, and state if that represents the skirt protector said firm are making.

A. They are making skirt protectors, and this represents the skirt protector they are making, with others.

Int. 4. Have you read, and do you understand, Miss Macdonald's patent of date September 29, 1874; if yea, does Exhibit No. 4 illustrate the dress protector therein described?

A. I have read the patent, and understand it, and Exhibit No. 4 seems to illustrate her invention therein described?

Int. 5. Please state, if you know, what was used for dress protectors before Miss Macdonald's waterproof protector.

A. Plaited wiggan.

Int. 6. Complainant's patent states "heretofore skirt protectors have been made of a plaited or fluted strip of wiggan or other fabric, stiffened with starch, which on becoming wet gets limp, looses its shape and absorbs the dirt, besides being objectionable on account of the harsh scraping noise it makes upon the pavement." Do you know of this objection existing with regard to wiggan protectors not bound with waterproof cloth?

A. I do.

Int. 7. Please state where Miss Macdonald's waterproof protector is put upon the dress. Whether or not it is placed so that the protector shall come between the lower edge of the dress or skirt and the sidewalk, and in that connection please look at Complainant's Exhibit No. 5, and state if that illustrates the method of attachment of said protector to a dress.

A. The protector is attached as shown in Complainant's Exhibit No. 5, and is intended to come between the lower edge of the dress and the sidewalk and extending below the edge of the dress.

Int. 8. Is it within your knowledge, sir, when gored dresses like this Exhibit No. 5 first came in fashion?

A. To the best of knowledge they have been worn about ten years.

Int. 9. Miss Macdonald's patent says, quoting therefrom, "My invention relates to protectors for the lower edge of dresses, and other garments, and consists of a band or strip of fluted or plaited fabric either waterproof itself, or covered or bound with any waterproof material." Please state what advantage a skirt protector thus made and attached, as you have described, is over and above any other skirt protector made or used without such waterproof material.

A. There seems to be more wear, besides being waterproof, than any other skirt protector.

Int. 10. Does such a waterproof protector, made as described in complainant's patent and attached as you have described, prevent the dress from getting wet and prevent the absorption of dirt, retain its shape, and obviate the scraping noise of wiggan.

A. It seems to me that it does.

CROSS-EXAMINATION by Causten Brown, Esq., of Counsel for Defendants.

Cross-Int. 11. Does the firm of E. M. Watson & Co. make and sell dress protectors under a license of the Macdonald patent?

(Objected to for the reason that this question involves the character of a paper not in evidence, and because it does not appear whether it has been given before or after this suit was commenced; also it is hearsay.)

A. They do, so far as I know.

Cross-Int. 12. What do you know which makes you think they do?

(Objected to as above.)

A. That when we were notified by Miss McDonald that we were infringing upon her patent we, or Mr. Watson, took advice.

[It is here admitted on behalf of the complainant that E. M. Watson & Co. are manufacturing and selling skirt protectors under license of the complainant granted since this suit commenced, and that they are the only parties licensed by the complainant so to do.]

Cross-Int. 13. Do you receive from Watson & Co. a fixed salary, unaffected by their profit or loss as a firm?

A. I do.

Cross-Int. 14. You say gored skirts came into fashion about ten years ago, and I understand that gored skirts have the breadth cut narrowing towards the waist as distinguished from straight skirts, which have the breadths the same width all the way. Is that correct?

A. I so understand it.

Cross-Int. 15. Is there any difference between a gored skirt and a straight skirt as to what kind of a protector should be put on, or how it should be put on?

A. There is. In a straight skirt there is no curving or shaping at the bottom of the dress. In a gored skirt the back breadths are each considerably curved or shaped. In order to make a protector for a gored skirt, it is necessary that the protector should accommodate itself to the shape or curve of the bottom of the skirt.

Cross-Int. 16. How must a skirt protector be made, then, in order to accommodate itself to the curve?

A. It should be made plaited or fluted or ruffled, and we sometimes cut goods on the bias. These are about the only ways.

Cross-Int. 17. Cutting cloth bias for the skirt protector will enable it to accommodate itself to the curve without ruffling, plaiting or fluting. Is that so?

A. I think not.

Cross-Int. 18. Then when you said, "We sometimes cut goods on the bias," what did you mean was the advantage in doing that?

A. On the bottom of the goods which we cut on the bias we stitch a ruffle or plaiting or fluting, there being a give to the goods on account of the bias which enables the top of the protector to be easily secured to the skirt.

Cross-Int. 19. If the protector goods are not cut bias, or not fluted, plaited or ruffled, the difficulty, as I understand you, in putting them on to a curved skirt-edge is, that the protector stuff must be puckered or gathered to work it on to the curve, and that makes it set badly in use. Am I right?

A. I so understand it?

Cross-Int. 20. And if the protector stuff is cut bias, this difficulty will not exist. Is that so?

A. It seems to me, in addition to the goods being cut bias, a ruffle should be put on, or plait, as we call it.

Cross-Int. 21. Do you say this from your own knowledge or observation of the way the skirt protector works in connection with the skirt edge?

A. I do.

Cross-Int. 22. If the protector stuff is cut bias, what is the reason that it is desirable, in your opinion, that it should also have a ruffling or plaiting put on to the bottom of the protector?

A. For the reason that of itself there is not give enough in bias goods to answer for the bottom of the protector but being placed over plaiting or ruffling assists the same in giving.

Cross-Int. 23. In making these skirt protectors under the Macdonald patent, how do Watson & Co. have the fluting or plaiting put on the protector?

A. By hand.

Cross-Int. 24. What I mean is, do they have it sowed or stitched on?

A. After the plaits are made by hand they are stitched by a sewing machine.

Cross-Int. 25. Suppose you have a fluted or plaited protector sewed on to a piece of cloth which is cut straight (not biased), and the protector attached to the skirt by attaching the straight-cut piece of cloth to the skirt, will that do for gored skirt-edges?

A. If the cloth to which the ruffling or plaiting is secured is a very thin or light cloth, there is very little difficulty in putting it on to the skirt so as to have it hang well.

Cross-Int. 26. If, then, you have the intermediate piece of cloth thin or light, there would be, I suppose you mean, no practical difficulty about the set of the skirt?

A. Not unless that piece of cloth was cut too wide.

Cross-Int. 27. What difference would it make if it was cut wide; and why would it make a difference?

A. The nearer the upper edge of the cloth is to the edge of the skirt, so is its length; and the cloth being wide, would necessitate its being laid in folds at the top.

Cross-Int. 28. Did you ever see a skirt protector on a dress-skirt, which protector was cut bias, and not provided with any ruffling, fluting or plaiting?

A. No, sir; never did.

Cross-Int. 29. Were Watson & Co. making skirt-protector goods just like complainant's Exhibit No. 4 before the Macdonald patent came out?

A. We made similar goods in 1873; the last of 1873 or first of 1874. The only difference is, the rubber binding is heavier which we now put on than that which we then put on.

Cross-Int. 30. When you first began to make those goods were Blackmer and Mandell making goods just the same?

A. I think not.

Cross-Int. 31. What difference was there between the goods you so began to make and the goods, if any, which Blackmer and Mandell were then making?

A. I do not know that they were making goods at that time; and it is strongly impressed upon my mind that we had been manufacturing these goods before they went into business.

Cross-Int. 32. What is the difference, as you understand it, between a skirt facing and a skirt protector?

A. A skirt facing, as I understand it, is of cloth or other material fitted to the lower part of the dress, varying in width. I don't know as there is any regular width to them; generally made of cambric, bound to the dress on the lower edge, usually with braid. A skirt protector is composed of waterproof material plaited or ruffled, the upper edge of which is fastened or sewed to the facing of the dress, and the lower edge allowed to drag beyond the bottom edge of the dress or skirt.

Cross-Int. 33. If a piece of waterproof material is sewed around the inside of a straight skirt near the bottom, and allowed to overhang the bottom edge of the skirt, say one-half inch all around, or in the back part of the skirt, will that be a skirt protector?

A. According to my idea it would be a skirt protector.

Cross-Int. 34. Does it make any difference how much it projects below the skirt-edge so long as it projects enough to be interposed between the skirt-edge and the sidewalk, so as to keep the dirt and wet from the skirt-edge?

A. It should project no less than a quarter to a half inch below the edge of the dress or skirt.

Cross-Int. 35. If a strip of waterproof cloth were cut bias and bound over the edge of the skirt inside and outside, extending up on each side as much as two or three inches from the skirt-edge, would that be a skirt protector?

A. It seems to me of itself that it would be.

DIRECT-EXAMINATION resumed.

Int. 36. Please look at complainant's Exhibit No. 5, and state whether that has a skirt protector, and also a skirt facing, and state which is which.

A. It has both. The skirt facing is stitched around the bottom of the dress inside. The part labeled "facing" is the skirt facing, and the plaited part is the skirt protector.

Int. 37. Please hear the 35th cross-interogatory read again, and the answer, and looking upon this Exhibit No. 5, see whether you mean to say in answer to that 35th cross, whether the strip described in that question is a facing or skirt protector in the sense of Macdonald's patent?

(Objected to.)

A. In the sense of Macdonald's patent I would call that a facing; I mean the thing mentioned in the 35th question.

Int. 38. Now please look at Complainant's Exhibit No. 6, and state whether that piece of enameled cloth, sewed on as shown in said exhibit, and bound at the lower edge with braid, is a skirt facing or skirt protector, in the sense of said Macdonald patent?

(Objected to.)

A. It is a skirt facing.

Int. 39. Please state if that is put on to a straight-breadth skirt or a gored skirt?

A. It is a straight-breadth skirt.

Int. 40. Now, sir, will you state whether or not that piece of enameled cloth which appears to be attached to a skirt with straight breadths could be attached to a gored skirt successfully and without rumpling?

A. It could not.

Int. 41. Now please state whether or not a dress facing is made up with, and a part of, the dress, or not?

A. It is a part of the dress.

Int. 42. State whether or not a protector is a separate and distinct article from the dress, sold separate, and which may or may not be added to the dress as the owner desires?

A. It is.

Int. 43. If the dress protector is added to the dress, is it sewed on over the dress facing to extend below the lower edge of the dress and facing?

A. It is.

JOHN O. PRINCE.

Attest:

JOSEPH F. CLARK, Special Examiner.

EVIDENCE FOR DEFENDANTS.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED.

BEFORE ME,

N. AUSTIN PARKS, Special Examiner.

BOSTON, April 17, 1875.

DEPOSITION OF LOUISE J. RINGLAND.

Int. 1. State your name, age, residence and occupation, and how long you have been in that occupation.

A. Louise Josephine Ringland; residence, Boston, Mass.; I am a dressmaker in all its branches, and have been so for twenty years.

Int. 2. Of what country are you a native, and when did you come to this country?

A. I am a native of Belfast, Ireland; I came to this country in 1862; settled in New York at first, and came to this city about eight years ago.

Int. 3. Will you look at the piece of enameled cloth marked Defendants' Exhibit 7, and say whether you have ever used in your business, or on your own dresses, such material as that; and if yea, for what purpose, and when?

A. I have used it for the protection of my own dresses, and have put it upon those of my customers; I used it first in the fall of 1862.

Int. 4. Where did you buy this material?

A. As well as I remember, it was at Aitken & Miller's, Broadway, New York.

Int. 5. Was it on sale in strips?

A. It was in pieces about two and one-half yards long and two and one-half inches wide.

Int. 6. Of what color was the enameled cloth which you put on as protector in 1862?

A. Of different colors—black, green, &c.

Int. 7. To what part of the dress was this protector applied, and how?

A. To the lower edge of the skirt of the dress and sewed to the facing.

Int. 8. How far up above the lower edge of the dress did this strip of protecting material extend?

A. High enough to leave it even with the bottom edge of the dress.

Int. 9. Is it necessary that a skirt protector should hang below the edge of the dress in order to serve as a skirt protector?

A. It is not necessary.

Int 10. Why not?

A. Because the facing of the dress will wear soonest or first. The protector will take all the wear without hanging below the edge.

Int. 11. Will it also prevent the dress from getting wet?

A. Certainly it will.

Int. 12. Have you had, in your business, practical experience with skirt protectors both fluted or plaited and plain?

A. I have used almost all kinds that have ever been brought out.

Int. 13. I hand you a piece of protector consisting of wiggan and waterproof combined, being not fluted or plaited, but plain, which is marked Defendants' Exhibit 8, and I wish you to compare it with the plaited protector or waterproof attached to the complainant's Exhibit No. 5, and labelled Macdonald's patent, September 29, 1874, and also with the piece of dress protector, marked Complainant's Exhibit No. 4, and also labelled Macdonald's patent, September 29, 1874, and say whether, in your opinion, the plaited protectors possess any advantage over the plain protector, Exhibit 8.

A. I prefer the plain protector. It has a great many advantages that the others have not, and is a great deal preferable.

Int. 14. In what respects for the purposes for which a skirt protector is designed, do you think the plain preferable to the plaited or fluted?

A. Because it is much more easily cleansed, and will not wear off so soon.

Int. 15. You will notice that the plaiting of the protector piece attached to skirt Exhibit No. 5, is tacked or stitched across; that is, in the direction of the circumference of the skirt, both near the top and near the bottom, and the same is true of Exhibit Complainant No. 4; can protectors having the plaits so stitched

or tacked be applied to a gored skirt any more easily than a plain protector represented by Defendants' Exhibit No. 8?

A. No; it couldn't be applied any more easily to a gored skirt.

Int. 16. Has the demand for protectors for use upon skirts varied from season to season since you have been in the business?

A. Some seasons they were more used than others, but never wholly discarded.

Int. 17. Will you look at Exhibit 9, which represents a part of a muslin skirt with a muslin facing and a skirt protector of enameled cloth attached to the dress along the upper edge of the facing and hanging down to about the lower edge of the dress, and state how this corresponds with the manner in which you have testified that you applied to dresses, in 1862, the enameled cloth that you bought from Aitken & Miller.

A. The facing would be wider than appears in this exhibit, but I sewed on the enameled cloth in the same way.

CROSS-EXAMINATION by G. E. Betton, Esq.;

Cross Int. 18. You say you are a native of Belfast, Ireland; are you a Roman Catholic?

A. No, sir; I am an Episcopalian.

Cross-Int. 19. You say you came to Boston eight years ago; whose employ did you go into then?

A. I was never in any employ. I was always my own mistress.

Cross-Int. 20. When and where did you go into business, and what was it?

A. I formerly went out by the day dressmaking.

Cross-Int. 21. Who did you work for at first?

A. Mrs. William Pope, of Dorchester, and a number of other ladies in Dorchester.

Cross-Int. 22. Can you name any others you worked for at that time? If so, name them?

A. Yes; I worked for a family named King, and a great many other families in Dorchester.

Cross-Int. 23. Is that all you can name, and what is King's first name?

A. I can name a great many more. I think his name is Franklin King, but am not certain.

Cross-Int. 24. Why do you not name them—the others?

A. Because I don't think it necessary; I always did my work satisfactorily, and I don't care who knows the names of my customers.

Cross-Int. 25. It is not for you to judge, but give the names, if you can, or else refuse to.

A. I do refuse to.

Cross-Int. 26. When did you go into business for yourself, and where? I mean other than going out dressmaking.

A. I went into business last Fall, at 1552 Washington street.

Cross-Int. 27. What business was that?

A. Dressmaking and cloakmaking, and all its branches.

Cross-Int. 28. You say you came to this country in 1862: what did you do then; what business did you go into, if any?

A. Dressmaking.

Cross-Int. 29. Did you go out dressmaking, or go into any firm as employee?

A. First three months I went out by the day in New York; during the rest of my stay in New York I had an establishment of my own.

Cross-Int. 30. When did you leave New York?

A. It was in the month of May, eight years ago this next month.

Cross-Int. 31. What business were you in before you came to this country?

Dressmaking.

Cross-Int. 32. Do you know when gored skirts first came into fashion in this country?

A. About 1863; I first cut them, I think, in 1863.

Cross-Int. 33. Can you tell about nearer the year—spring, summer, fall or winter of the year?

A. No, I can't tell. Somewhere in that year.

Cross-Int. 34. You are positive it was in that year, are you?

A. Yes, I am.

Cross-Int. 35. Did you put any dress protectors on the garments of ladies at Mr. William Pope's or Mr. Franklin King's?

A. I put a black silk plaited ribbon on Mrs. William Pope's, and some of the ladies finished up their own; I don't know what they put on.

Cross-Int. 36. That you put on Mrs. Pope's then was not enameled cloth or india rubber, was it?

A. No, it was not; ribbon is not enamel cloth.

Cross-Int. 37. Please look at Plaintiff's Exhibit 5, and state what you call that part of it marked facing, J. F. C., Special Examiner?

A. I call that the facing.

Cross-Int. 38. Please look at Plaintiff's Exhibit 5, marked Macdonald's Patent, September 29, 1874, and state what you call that?

A. I call that a dress protector.

Cross-Int. 39. Is this, that you have called a dress protector, put on dresses or not at the option of the owner of the dress?

A. Certainly it is.

Cross-Int. 40. Are all dresses, when they are finished, finished with a facing?

A. Always, except in a case where they are lined throughout; then they don't require any facing.

Cross-Int. 41. When they are lined throughout the lining comes to the bottom of the dress, does it not?

A. Certainly; you couldn't finish it without.

Cross-Int. 42. Supposing the lining does come to the bottom of the dress, would there not still be required a facing, literally speaking, to hide the raw seams?

A. Certainly not; those who know how to finish their dresses will conceal their raw seams.

Cross-Int. 43. Then if I understand you, you would consider

a dress finished by being merely lined, without anything called a facing or other stiffening at the bottom of the dress?

A. I should with a nice braid.

Cross-Int. 44. Then when you use a facing, whether of any substance, or lining that comes down to the bottom edge of the dress, you put on a nice braid, do you?

A. Yes.

Cross-Int. 45. Do I understand you that you put this, Defendants' Exhibit 7, on to a dress, and where?

A. Not that identical piece.

Cross-Int. 46. Did you put on one like it, and where?

A. It couldn't be put on anywhere else but on the lower part of the skirt.

Cross-Int. 47. On whose dress or skirts did you put it on, and when?

A. I put it on my own first, and on a great many of my customers. In the fall of 1862 I first put it on my own dress, and in years after, as the different styles of protectors came up, I have always put them on.

Cross-Int. 48. This was put on, if I understand you, at the bottom of the dress or skirt, and come to the bottom edge of the skirt or dress, and was bound with a nice braid?

A. The protection wasn't bound, but the dress was.

Cross-Int. 49. Had this dress you speak of a facing or not?

A. It did. It had a good deep one, for it wasn't lined throughout.

Cross-Int. 50. Did you or not put on these protectors marked Defendants' Exhibit 7 in 1865, 1866, 1867 or 1868, or what years?

A. I have put on dress protectors all along, but not like Exhibit 7; I put on ones like Exhibit 7 in 1862,and perhaps in 1863.

Cross-Int. 51. What kind of protectors did you put on in 1865, 1866 ?

A. Well, I put on plaited braid which was used; there were different kinds in the market.

Cross-Int. 52. Did you put on any enameled cloth or India rubber cloth protectors in 1865 and 1866?

A. I can't remember as there was india rubber, but there was plaited wiggan and plain put on.

Cross-Int. 53. How was it in 1867 and 1868; did you then put on enameled cloth or rubber cloth protectors?

A. I didn't put on enameled cloth then nor rubber.

Cross-Int. 54. Did you use wiggan protectors during those years 1865, 1866, 1867 and 1868?

A. Yes.

Cross-Int. 55. Were those plaited or fluted?

A. I can't be certain; I think they were plaited like Complainants' Exhibit 5, but were not rubber.

Cross-Int. 56. Did these protectors that you speak of, that were used by you in 1865, 1866, 1867 and 1868, which were plaited but not made of rubber, extend around the bottom of the back part of the dress, or all around?

A. I never put them all around.

Cross-Int. 57. Were these gored-skirt dresses, or straight-skirt dresses?

A. I haven't made any straight-skirt dresses for years.

Cross-Int. 58. For how many years?

A. Well, since 1865, I haven't made any, certain; they have all been partially gored that I have made.

Cross-Int. 59. Then if I understand you, you have never made any dresses, except those that were cut with gored skirts more or less?

A. That takes in a wide scope. I said since 1865. Before that I made them straight.

Cross-Int. 60. Did you put a protector like this Exhibit 7 on to the dresses which you say you made since 1865?

A. I did not.

Cross-Int. 61. Did you put on protectors like Defendants' Exhibits 8 and 9 on dresses made, as you say, after 1865?

A. I did not put on the enameled cloth like Exhibit 9 at that time, and I didn't put on No. 8, for I don't know as the rubber was known at that time for that purpose. I put in wiggan protectors

[Adjourned to 19th inst., at 10 A. M.]
[19th April, adjourned to 20th, at 10 A. M.]
[20th April, adjourned to 21st, at 1 P. M.]
[21st April, adjourned to 22nd at 10 A. M.]
[22nd, Examination resumed.]

Cross-Int. 62. Do you keep books of account, and when did you begin to keep such?

A. I do not.

Cross-Int. 63. You say you bought some enameled cloth like Exhibit 7 of Aitken & Miller, of New York; what makes you think you bought of them?

A. Well, I was in the habit of trading there for my trimmings, buying them there, and I am positive it was there that I bought it.

Cross-Int. 64. Have you any bill or voucher from them?

A. I have not; I always pay cash.

Cross-Int. 65. Did you buy such protectors of anybody else at that time?

A. Well, later in the years I did buy them at different places; different kinds of protectors.

Cross-Int. 66. In what years did you buy such protectors elsewhere?

A. All down through the years, as they came out, different kinds of protectors.

Cross-Int. 67. Can't you tell in what years you purchased any of the different kinds?

A. I cannot, because there are a great many different kinds.

Cross-Int. 68. What quantity of such enameled cloth protectors did you buy of Aitken & Miller?

A. I couldn't tell how many, but if you mean the first one particular piece, I think it was two and one-half yards long.

Cross-Int. 69. Were such protectors kept and sold by them as dress-protectors?

A. They were.

Cross-Int. 70. Whose dress did you put this skirt protector on to?

A. My own, the first protector I bought.

Cross-Int. 71. Whose else?

A. I can't tell whose next I put it on.

Cross-Int. 72. Was this a gored dress that you put it on to?

A. My own was not gored.

Cross-Int. 73. Did you put it on to any ladies' dresses cut gored that year—1862?

A. I did not,

Cross-Int. 74. Where was your place of business in New York?

A. At 121 Varick street; I think that was the number.

Cross-Int. 75. In what year did you work for William Pope's and Franklin King's families?

A. In 1867, I think, for Mrs. Pope, and later than that for Mrs. King, but I can't say in what year.

Cross-Int. 76. You say the young ladies of Mrs. Pope's family completed their own dresses, and you don't know what they put on for protectors; did you do anything more than cut and fit the Misses Pope's dresses?

A. Mrs. Pope has no daughters unmarried; I worked for herself.

Cross-Int. 77. You said that the ladies at Mrs. Pope's completed their own dresses; I ask of you did you do anything more than to cut and fit them?

A. Sometimes I did some sewing, but never wholly finished one; never finished one throughout.

Cross Int. 78. Wasn't your business that of cutting and fitting and not finishing dresses?

A. I have finished some dresses, but not for that particular party.

Cross-Int. 79. On whose dresses, and when, did you put protectors like this Exhibit 9?

A. The first I put on my own; on whose afterwards I don't know; I can't remember; I don't know whether I ever put it at all on other dresses.

Cross-Int. 80. Did you put on protectors like Exhibits 7 or 9 on to any gored dresses?

A. I think not.

Cross-Int. 81. You say you put on these protectors in 1862, and perhaps 1863: did you in 1864 and 1865?

A. It was very late in 1862 when they came out first. I may have put them on in those years you mention.

Cross-Int. 82. Do you think you did in 1864 and 1865?

A. I think I did, or that they may have been put on by those finishing up the dresses that I cut.

Cross-Int. 83. Did you put them on, or see them put on in those years?

A. Yes; I've seen them on the dresses in those years.

Cross-Int. 84. You mean like Exhibits 7 and 9, do you?

A. I do not.

Cross-Int. 85. You have not been asked about any other Exhibits than 7 and 9, have you?

A. Not to-day.

Cross-Int. 86. You say you went into business here in Boston for yourself last fall at 1552 Washington street. Is that the first time and first place you have been in business for yourself or anybody else in any store?

A. I've never been in a store for any person in business for the last twenty years. I've been in business for myself in New York.

Cross-Int. 87. How old were you when you came to this country?

A. I think I was twenty-six years of age.

Cross-Int. 88. The reason I asked you whether you had been in business as occupying a place of business was, that I do not find your name in the directories as a dressmaker: how is that?

(Objected to for form and as incompetent.)

A. I don't know whether it is or not. I don't know anything about it.

Cross-Int. 89. In answer to 45th cross you say, "I did not put on this identical Exhibit 7 as a protector, but one like it:" how do you mean like it; was it plain, or plaited?

A. If it was in the fall of 1862, it was a plain one. Those that I put on in the fall of 1862 were plain, not plaited or fluted.

Cross-Int. 90. When you sewed a piece of enameled cloth like Exhibit 7, did you sew it directly to the facing?

A. I did. I sewed it on the facing?

Cross-Int. 91. Would such piece of enameled cloth so sewed on to the facing set well on a dress?

A. No, it would not; not generally.

Cross-Int. 92. Why not?

A. There are two or three reasons. It is hard to sew through the cloth to make it set well. It is stiff. That's the only reason I can give, and I would like to correct it when I said two or three.

Cross-Int. 93. Do you mean it is difficult to sew it on because it is stiff?

A. Yes.

Cross-Int. 94. There is only one side of this Exhibit 7 glazed, is there? The side not glazed would absorb water, would it not?

A. There is only one side glazed. I don't know about anything else. The glazed side goes down or next the ground.

Cross-Int. 95. You say in answer to 53d and 54th cross, "I did not put on enameled-cloth protectors or rubber-cloth protectors between 1863 and 1868, inclusive, but used wiggan;" were such wiggan protectors plain, or plaited?

A. I think they were plaited.

Cross-Int. 96. Were such dresses trimmed that you refer to in the last answer; if so, with what?

A. I can't remember what I trimmed the dresses with; different fabrics were differently trimmed.

Cross-Int. 97. Did you make ball dresses, wedding dresses or reception dresses in those years, and if yea, how did you finish the lower edge of the dresses?

A. I finished some of them with a braid, and some with a plaiting of the material of the dress put around the skirt after the braid. There were different ways of finishing them according to the fabric or different styles desired.

Cross-Int. 98. Is not plain wiggan always put on to the bottom of a dress as an extra facing, to stiffen and improve the hanging?

A. It wouldn't improve the hang any, and certainly wouldn't add to the stiffening.

Cross-Int. 99. Do you remember of whom you purchased wiggan protectors, between 1865 and 1868, inclusive, as you have stated?

A. I bought them at any place: they were sold at all the thread and needle stores, or almost all of them.

Cross-Int. 100. Do you remember on whose dresses you put such protectors in those years?

A. I cannot, I am sure.

Cross-Int. 101. When you made dresses, as you have said, with a lining throughout, do you mean that they had no facing or stiffening?

A. They had no facing; sometimes I put in a stiffening of hair cloth.

Cross-Int. 102. Where did the stiff facing go; inside the lining, or outside?

A. Outside.

Cross-Int. 103. What did you say the stiffening was composed of?

A. Hair cloth.

Cross-Int. 104. Did I ask you if you were a married woman or not; if not, how is that fact, and is your husband living or dead; and if he is dead, where did he die?

A. You did not ask me whether I was a married woman or not; I am a widow; my husband died in Boston.

Cross-Int. 105. Whereabouts in Boston?

A. That I can't state exactly.

Cross-Int. 106. Was he divorced from you?

A. I had occasion to divorce my husband; I mean to sue for a divorce.

Cross-Int. 107. Was this in Boston?

A. Yes.

Cross-Int. 108. Was it on your application or his?

A. On mine.

Cross-Int. 109. How long ago was this?

A. I am not certain, but my lawyer, George F. Homer, can answer those questions, I presume.

Cross-Int. 110. Can't you tell what year, or about what year, it was?

A. I should think it was between five and six years ago.

Cross-Int. 111. Where did you live in New York; with whom?

A. With Mr. and Mrs. John Allen; I boarded there part of the time, and with a Miss O'Reilly; those were the only two.

Cross-Int. 112. Where did they reside when you lived with them?

A. Mr. Allen on Varick street, and Miss O'Reilly on Twenty-third street; I was only a short time with her.

Cross-Int. 113. What were the numbers of the houses?

A. The house on Varick street, I think, was No. 121; I do not remember the number of the house on Twenty-third street.

Cross-Int. 114. Have you talked with any one relative to your testimony in this case; if so, with whom?

A. Yes; when I have been obliged to; it has taken me from my business, and I was obliged to tell persons that I was summoned as a witness.

Cross-Int. 115. Do you mean by that that your customers are the only persons yon have talked to?

A. No; I've talked to a number of my friends about the annoyance I was getting, and I have talked to Mr. Browne and Mr. Holmes, the counsel for defendants, and Mr. John B. Babcock, of John B. Babcock & Co., I believe.

Cross-Int. 116. You spoke of putting on (when you used a lining throughout a dress) a piece of hair cloth as a stiffening; how did you finish the dress at the bottom with such a piece of stiffening upon the dress?

A. I covered that stiffening with cross-way cambric, and finished both it and the dress by sewing them together with a braid.

Cross-Int. 117. That would be equivalent, then, to a facing, would it not?

A. It is not; it is only a covering for the stiffening.

Cross-Int. 118. Wouldn't such hair-cloth in damp weather curl up?

A. I never had any experience of any of it curling up, and if it is properly put in it won't, either.

Cross-Int. 119. Do I understand that you are using that now?

A. Very seldom; sometimes a lady wishes it.

Cross-Int. 120. Was such a thing ever used in a dress long enough to touch the ground?

A. I have used it in demi-trains; I don't use it in walking dresses.

Cross-Int. 121. Now will you answer the question that I put to you?

A. I can't answer it in any other way.

Cross-Int. 122. Does a demi-train dress touch the ground?

A. It is supposed to rest on the ground a quarter of a yard at the shortest.

Cross-Int. 123. Then you have used such a hair-cloth stiffening on a dress long enough to touch the ground, have you not?

A. I've put them on demi-trains, I said; they touch the ground.

DIRECT-EXAMINATION resumed:

Int. 124. Will you please answer the cross-interrogatory 25, and give the names, so far as you can remember, of the persons for whose dresses enameled cloth like Exhibit 7, referred to in that question, was used in the way you have described?

A. I refused to give the names lest it might subject them to the annoyance of being asked the questions that were put to me, and because it might injure me in my business; those were the only reasons; I put it on my dress, and I know it was put on to a dress of Mrs. James Hurd, of (Objected to as no such person is set up in the answer) New York, and I've known it put on by the sempstresses of the houses and by the sempstresses employed by me at that time, but I didn't put them on myself, personally.

(Objected to as above.)

Int. 125. Will you look at your answer to cross-interrogatory 79, and say whether or not you desire to make any explanation of it; if so, what?

A. What I mean by that is, that I didn't individually put it on, but the sempstresses of the house did it, or those in my employ; I knew that they were put on.

Int. 126. How long did you use the protector upon your own skirt?

(Objected to as being not brought out by the cross-examination, but should have been by the examination in chief.)

A. I can't remember exactly how long, but it wasn't very long, because I didn't like the noise it made in walking along the pavements; there was no other objection to it that I know of.

Int. 127. You have said that an objection to thick material as a protector at the bottom of skirts is, that it is difficult to sew through it; please explain precisely what that difficulty is?

A. It is difficult to sew through it, and it will naturally draw the outer fabric of the dress out of shape—crinkle it up—if it is a thick material; this is the case with any thick material.

Int. 128. With such a material used is it more or less difficult to sew through so as to avoid drawing, if you use a plaited or a plain material?

A. It is because of its thickness; the plaited is more difficult, because it is thicker and more difficult to keep in place.

Int. 129. If enameled cloth, the same as Exhibit 7, were plaited or fluted, would there be any greater or less difficulty in applying it to the skirt than if it were plain?

(Objected to as per 126th interrogatory.)

A. It would be a great deal more difficult if plaited.

Int. 130. Look at your answer to cross-interrogatory 40, and

say whether or not you desire to make any correction or modification in regard to it; and if so, please do so.

A. All my nice dresses I finish with a facing or lining throughout, but I have known persons to put hems on to some fabrics.

Int. 131. What do you mean by a demi-train?

A. I mean a skirt that rests on the floor from a quarter of a yard to more—sometimes they are longer.

Int. 132. Do you remember the names of any other persons for whom you or your workwomen put on in New York protectors like Exhibit 7?

(Objected to as examination of a subject which should have been submitted in chief.)

A. No, I do not; I remember the names of many that I worked for there, but I can't say for whom I put them on; I put on some, but can't say for which.

Int. 133. Please look at cross-interrogatories 22 to 25, inclusive, and give the names inquired for in those questions, if you are able to remember them, or any of them.

(Objected to as already answered.)

A. Mrs. Howe, on Washington street, near Codman's church, Sixteenth ward (these families that I work for finish their own dresses or have sempstresses to do so); Mrs. Gardner Chase, on Dorchester avenue; Mrs. Benjamin Newhall, I don't know the street; Mrs. Carter, Mill street; Mrs. Freeman, Everett street; there are many others whose names I can give if you require them.

Int. 134. Will you look at cross-interrogatories 80 to 85, inclusive, and state what you referred to in answering those interrogatories?

A. I say again this enameled cloth, Nos. 7 and 9, was superseded by other different kinds as they came out; I did put other kinds of protectors on, or saw them put on; I didn't put them on myself, but saw them after they were put on; they were wiggin; that is, the next that came out was; it was put on plain, and sometimes we plaited it; it was turned up on the edge and sewed with long stitches, making an inch double; by inch double I mean it is turned up an inch so as to bring the double down to the bottom of the dress; the wiggin was sewed to the lining of the dress, or the facing if it wasn't lined throughout.

CROSS-EXAMINATION resumed.

Cross-Int. 135. Where have you got all this additional light and information since the adjournment?

(Objected to for form.)

A. I haven't any more light than I had at first; that is, relative to these different goods.

Cross-Int. 136. Was your husband's name Ringland, or what was it?

A. My husband's name was not Ringland; it was Dunlap.

Cross-Int. 137. I asked you a great many times before the adjournment for the names of persons on whose dresses protectors

were placed; why couldn't you tell me then? Where have you got the knowledge since?

A. I had a conversation with Mr. Holmes during the adjournment, and told me to state the names of these persons, and I have done so.

Cross-Int. 138. I haven't asked you who you conversed with since the adjournment, but I ask you where you got the names; you say you keep no books?

A. I have a good memory and could give you a great many more names if you want it.

Cross-Int. 139. In what years were you employed by these people whom you have named?

A. I have worked for two years past for Mrs. Howe; three years past for Mrs. Chase; four years past for Mrs. T. J. Loring; I think two and one-half years ago I worked for Mrs. Newhall, and nearly two years ago for Mrs. Carter.

Cross-Int. 140. Did you put skirt protectors upon the dresses of these ladies, or cause them to be put on by your employees; if so, what kind did you put on?

(Objected to as not open on redirect examination.)

A. I didn't finish the dresses, and I don't know what they put on; I always have sempstresses to finish the dresses, or the ladies have their own or finish them themselves.

Cross-Int. 141. If you employed sempstresses to finish the dresses for those families, what kind of protector did they put on, or did they put on any?

(Objected to as before.)

A. I don't know; I seldom examined the dresses after they were finished when they were done in the house by the family, or their sempstress.

Cross-Int. 142. You say these enameled cloth, Nos. 7 and 9, were superseded by different other kind of protectors as they came out: when did those other different kinds of protectors come out?

A. That I can't answer; I don't know exactly; I can't specify any particular date.

Cross-Int. 143. What stores had them for sale in Boston?

A. I can't tell the names; they kept them in thread and needle stores, and I guess they do now, and in trimming stores.

Cross-Int. 144. Do you mean that they have wiggan protectors for sale now in those stores?

A. They have protectors which are partially made of wiggan; I mean things like Exhibit 8.

LOUISE JOSEPHINE RINGLAND.

Attest: N. AUSTIN PARKS,
Special Examiner.

DEPOSITION OF MRS. JANE M. KITTREDGE.

APRIL 23, 1875.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq.

(Counsel for complainant objects to the examination of this witness as he has not been notified thereof in the answer; objections waived as to this witness.)

Int. 1. Please state your name, age, residence and occupation?

A. Jane M. Kittredge; forty-nine; 167 Tremont street, Boston; dressmaker.

Int. 2. Please state how long you have resided in Boston, and how long you have been employed as a dressmaker, and for whom, and where.

A. I have resided in Boston fifteen years; have been employed as a dressmaker for about the same time; for Mr. James W. Coverly for three years, the first of my coming to Boston, and since that time for myself.

Int. 3. Please look at the enameled cloth marked Respondents' Exhibit 7, and state whether or not you have ever put such cloth in dresses made by you or under your direction; if so, state how it was applied to the dress, for what purpose, and when.

A. It was put on to protect the bottom of a dress; it did not come below the dress; it came down even to the bottom of the dress; it was between the years 1862 and that down to about three years; I mean three years from 1862, the time I commenced; it was put on the back part of the dress; sewed on to the back part of the skirt; sewed on to the facing, not through the dress; I put it on to several dresses; I couldn't tell the exact number; I may have put it on to twenty or thirty; this was put on to protect the dress from getting soiled or wet; I commenced putting it on first when I was at Mr. Coverly's, and used to put them on there when the ladies wished it.

Int. 4. How soon after you went to work for Mr. Coverly did you first put this protector on to ladies' dresses?

A. I put it on the second month after I went to work for Mr. Coverly.

Int. 5. Have you ever put on other protectors to ladies' dresses since you have been in Boston; if so, when, and what kind?

A. I have put on plaitings, of the same material as the dress, and ribbons for a protector; also ruffles for protectors; I have put them on all along to the present time.

Int. 6. All along for what time?

A. All along for eight years; since I have been in Boston I have used those things for protectors.

Int. 7. When did you first put on plaitings of the same material as the dress?

A. Twelve years ago since I first put on a plaiting at Mr. Coverly's.

Int. 8. Did those plaitings project below the bottom of the skirt?

A. I never put them below the edge, only just even with the edge and underneath the skirt, sewed on to the facing.

Int 9. What is the facing of the dress?

A. The facing of a dress is the protection of the material of dress; the facing extends up a quarter or half a yard, more or less, from the bottom of the dress all around, on the inside of the dress.

Int. 10. What do you mean by "protection" of the material?

A. I mean protection of the wearing of the silk or material of the dress.

Int. 11. Does the facing help to give shape to the skirt?

A. It shapes the skirt,—keeps it stiff.

Int. 12. Please look at respondent's Exhibit 9, and say whether or not that represents the way in which you applied the enameled cloth to the skirts of dresses as you have described?

A. In the same way.

Int. 13. Is it or not necessary that the skirt protector should project below the bottom of the skirt; is there any advantage in having such projection?

A. There is no reason why it should project below the bottom of the skirt, and there is no advantage in it. I consider that the protection should come underneath the skirt. The underneath part of the skirt is the rubbing and wearing part, and that should be protected.

Int. 14. Do you know in what form this enameled cloth was sold during the time that you applied it to dresses, as you have said?

A. In straight strips; I never put on any wider than four inches. It came in various colors,—blacks, browns, drabs, &c.

Int. 15. Please state whether or not there is any greater difficulty in applying to the bottom of a skirt a plain strip of protecting material than in applying the plaited or fluted strip of the same material?

A. There is no difference; one is as easy as the other.

Int. 16. Please say whether or not a plaited or fluted protector possesses any advantage over a plain protector in protecting the dress from wear or soiling, and if so, what?

A. I don't consider that there is. I think a plain protector is the best, because the dirt accumulates in the plaited protector, and the plain one you can wipe off readily.

CROSS-EXAMINATION by G. E. Betton, Esq.

Cross-Int. 17. What was Mr. J. W. Coverly's business when you came there?

A. Millinery and dressmaking.

Cross-Int. 18. In what year do you say you first came to his place?

A. Fifteen years ago.

Cross-Int. 19. Do you keep any books of account?

A. I have got my books.

Cross-Int. 20. When did you commence keeping books of account?

A. When I went into business for myself nine years ago.

Cross-Int. 21. Where did you go into business for yourself; what street and number?

A. In Winter street in Boston, at the corner of Music Hall place.

Cross-Int. 22. How do you know that you put on enameled cloth like Exhibit 7 in 1862, or between 1862 and 1865?

A. Because I remember putting it on to ladies' dresses as they brought it in.

Cross-Int. 23. You put it on plain, did you, in those years?

A. I did.

Cross-Int. 24. You speak of sewing it on to the facing; did the facing extend to the bottom of the dress, and was the facing sewed top and bottom to the dress, and then the protector sewed to the facing?

A. It was.

Cross-Int. 25. Did you put on this kind of protector in 1865 and 1866?

A. I did.

Cross-Int. 26. What time in 1862 do you remember putting this kind of protector, like Exhibit 7, on?

A. I can't tell the exact time.

Cross-Int. 27. What time in 1863 did you put protectors like Exhibit 7 on?

A. I put one on in the fall of 1863.

Cross-Int. 28. Are you sure it was like Exhibit 7?

A. Yes; it was like that.

Cross-Int. 29. On whose dress did you put it on in the fall of 1863?

A. That's a hard question for me to answer. I can't remember.

Cross-Int. 30. Was there any difficulty about sewing on this protector like Exhibit 7, on account of thickness or stiffness?

A. No, not at all.

Cross-Int. 31. Would such a protector, made of enamelled loth, contract or expand by a change of atmosphere?

A. I never knew it to.

Cross-Int. 32. Do you, or have you, made ball dresses or reception dresses, and how are they finished at the bottom?

A. They are finished with a plaiting at the bottom—with plaited ribbons.

Cross-Int. 33. Do you cut and fit dresses and finish them also, and when did you begin to cut and finish altogether?

A. I do; ever since I have done dressmaking.

Cross-Int. 34. When did you first begin to cut, fit and finish dresses; what year?

A. Twenty years ago since I commenced.

Cross-Int. 35. In answer to the 27th cross-interrogatory you say, "I put on a skirt protector like Exhibit 7 in the fall of 1863;" was that the first skirt protector you remember putting on?

A. Yes; those I put on at Mr. Coverly's were the first I put on.

Cross-Int. 36. Do you remember putting on skirt protectors like Exhibit 7 in 1862?

A. I do; that was while I was at Mr. Coverly's; I don't remember the dates, but I put on those protectors from the time I went there, or I began about two months after I went there.

Cross-Int. 37. In what year and month did you go to J. W. Coverly's?

A. I can't tell you now, but I have got it down; I don't remember.

Cross-Int. 38. Did you put on protectors like Exhibit 7 in the years 1865, 1866, 1867 and 1868?

A. I don't remember.

Cross-Int. 39. Did you put on any protectors in those years?

A. I put on ruffles, plaitings of ribbon and such things, as protectors.

Cross-Int. 40. Do you mean on street dresses, ball dresses or reception dresses?

A. I put them on all.

Cross-Int. 41. Where did you obtain your skirt protectors like Exhibit 7?

A. At Mr. F. W. Cobb's, 18 Winter street.

Cross-Int. 42. After leaving Mr. Coverly's, did you go into business for yourself in a store, or go out dressmaking; and if so, where?

A. I went into rooms for myself in Avon place, the last house on the right from Washington street, as a dressmaker.

Cross-Int. 43. Were these dresses that you put protectors upon while you were at Mr. Coverly's gored dresses?

A. Some of them.

Cross-Int. 44. In answer to 1st direct-interrogatory you say, "I have lived in Boston fifteen years;" did you go to Mr. Coverly's when you first came to Boston?

A. Not quite; I was here a few weeks before I went there.

Cross-Int. 45. And you say you remained there three years from the time you first came to his place?

A. Yes.

Cross-Int. 46. You recognize the distinction, do you, between a skirt facing and a skirt protector, and in that connection please look at complainant's Exhibit No. 5, and state if that part marked "facing" is a facing as you understand it; and that part marked "Macdonald's Patent, September 29, 1874," and plaited, is a protector?

A. A skirt facing is put on to protect the material of the dress, and give a shape to the bottom of the dress; a skirt protector is put on to keep the bottom of the dress from soiling, and is separate from the dress; the part marked "facing" is a facing, and that plaited and marked "Macdonald's Patent," is a protector.

Cross-Int. 47. Are all dresses when they are finished, finished with a facing?

A. They are.

Cross-Int. 48. These protectors, as I understand you, come down even with the bottom of the dress?

A. Yes, sir.

Cross-Int. 49. Did you ever put on all wiggan protectors, and when for the first time?

A. I never did.

Cross-Int. 50. Did you ever put on any hair-cloth protectors?

A. I never did.

Cross-Int. 51. Did you put on enamelled-cloth protectors or rubber-cloth protectors in 1867, 1868, or between 1867 and 1870, inclusive?

A. Between 1867 and 1870 I put on the rubber cloth and enamelled cloth also.

Cross-Int. 52. Do I understand you that you put on rubber cloth during all the years 1867 to 1870, inclusive?

A. Yes.

Cross-Int. 53. Were these plain, or plaited, or fluted?

A. They were mostly put on plain.

Cross-Int. 54. And on gored dresses, if I undertand you?

A. Yes.

Cross-Int. 55. Where did you reside before you came to Boston?

A. At St. Albans, Vermont.

Cross-Int. 56. In what shape were these protectors you say you bought of Mr. Cobb in Winter street, as to length and width?

A. They were straight; of different widths; three or four inches wide: I bought them by the yard.

Cross-Int. 57. Then the enamelled cloth should be light and thin like Exhibit 7, to be easily sewed on to set well, should it?

A. Some was and some was not.

Cross-Int. 58. Were the dresses that you made in the years you refer to trimmed; if so, with what?

A. Some were and some were not.

Cross-Int. 59. Is not plain wiggan generally put on to the bottom of a dress as an extra facing, to stiffen and improve the hanging?

A. I don't use it; I know few that do use it.

Cross-Int. 60. Who first spoke to you about testifying in this case?

A. I think it was Mr. Blackmer.

Cross-Int. 61. Please state whether or not, if you did not use wiggan for stiffening the bottom of a dress, you used something else for the same purpose?

A. I did not.

Cross-Int. 62. Then, if I understand you correctly, you merely put on to dresses a cambric or muslin facing, or what is called crinoline; is that correct?

A. That is correct.

Cross-Int. 63. Then, in case you made a light silk dress, such as is worn in summer, would you put on nothing but a cambric or muslin or crinoline facing?

A. That's all; I lined my skirts.

Cross-Int. 64. Do you line all your dresses, such as brilliantines or heavy poplins?

A. I line all my dresses, except brilliantines and poplins, and those I face with alapaca to match the dress?

Cross-Int. 65. Do they not require something else?

A. They don't in my style of dressmaking

Cross-Int. 66. How were these dresses so faced, as you have stated, finished at the bottom?

A. The two edges were laid together and bound with a braid, or sometimes turned over and hemmed without any braid.

DIRECT-EXAMINATION resumed:

Int. 67. Will you look at your answer to cross-interrogatory 27, as recorded, and state whether or not you desire any change to be made therein, and, if so, what?

A. I mean I put *them* on in the fall of 1863; no one in particular.

Int. 68. Have you any memoranda which will enable you to fix the date of your going to work for Mr. Coverly, and, if so, will you consult them and state the date?

A. I have, but not here; I will consult them and fix the date; I have no doubt that the year I went to work for Mr. Coverly was 1860.

Int. 69. In your answer to Direct-Interrogatory 3, you say that "it was between the years 1862 and that down to about three years; I mean three years from 1862, the time I commenced," that you put on enamelled-cloth protectors like Exhibit 7; and in answer to Cross Interrogatory 36, you say that you put on those protectors from the time you went to Mr. Coverly's, or from about two months after you went there; will you look at the questions and answers referred to, and make any correction in either of them that you desire?

A. It was soon after I went to Coverly's that I commenced putting them on, and I find that I went there in 1860 instead of 1862, and I desire to make this correction in my answer to interrogatory 73.

CROSS-EXAMINATION resumed:

Cross-Int. 70. In your 35th cross you say the first skirt protector you remember putting on was in the fall of 1863; was that true or not?

(Objected to for form, and as assuming what witness did not state in the answer to the question.)

A. That was not true, because you understood I did not remember the dates until now.

Cross-Int. 71. Then you made a mistake of three years, did you?

A. On finding the date that I went to Mr. Coverly's, I did.

Cross-Int. 72. You say you kept no books of account until you went into business for yourself; how do you know now that you put on such a skirt protector when you first went to Mr. Coverly's?

A. I know it from my memory; it was something new.

Cross-Int. 73. Is that the only way you know it?

A. It is; my memory alone.

Cross-Int. 74. Do you mean the enamelled cloth was put on like Exhibit 9, even with the bottom of the dress, and not sewed down to the bottom of the dress, or how otherwise?

A. It was sewed down to the bottom of the dress.

Cross-Int. 75. Did you buy the enamelled cloth for skirt protectors, you have referred to, at any other place than Cobb's?

A. No other place.

J. M. KITTREDGE.

Adjourned to 24th at 10 A. M.

Adjourned to 26th at 10 A. M.

Attest:

N. AUSTIN PARKS,
Special Examiner.

DEPOSITION OF ANNIE E. MELLUS.

APRIL 26, 1875.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq.:

Int. 1. State you name, residence and occupation?

A. Annie E. Mellus; residence, Boston, Mass.; I am a manufacturer of ruffling and lace goods.

Int. 2. How long have you been engaged in that business?

A. I have been engaged for myself since the great fire in November, 1872.

Int. 3. What was your occupation before you commenced business for your yourself, and for how long were you in that occupation?

A. I was overseer in a large manufacturing establishment, that of C. W. Griffiths, of Boston, manufacturer of nets, lace collars, dress trimmings, ladies' dresses or suits, &c.; I was there for some eight or ten years.

Int. 4. While you were so employed at Mr. Griffiths, did you use any protectors for the bottom of the skirts of your dresses?

A. I did.

Int. 5. Will you look at Respondents' Exhibit No. 10, now offered in evidence, and state whether or not that represents the dress protector used by you while you were in Mr. Griffiths' employ, and if not, how it differs?

A. It was like it,—just like it,—except as to color, which was brown; this exhibit consists of the protector, the enamelled cloth, and the cambric holding the protector to the facing of the dress; that which I used at the time referred to consisted, like this, of cambric and enamelled cloth.

Int. 6. Please state how it was applied to the dress?

A. I put it on the bottom of the skirt, on the back widths; that is, starting from the sides and going back; I cut the cambric narrower, making a binding of it; I turned the enameled cloth up at the bottom and hemmed it with a needle to prevent

showing the white inside of the enameled cloth. Then I felled this cambric binding to the facing of my dress to protect the skirt from the dampness and dirt of the sidewalk.

Int. 7. Please state when you first made and used a protector such as you have described?

A. In 1864; it was on my own dress; I used it on every dress I wore in the street, not on every dress, for about two years, I think.

Int. 8. Did the enameled cloth which you so used project below the bottom of the dress?

A. It did not; it came quite to the bottom of the binding of the dress so as to protect the braid.

Int. 9. Will you say whether or not during this time that you used such dress protectors you used with them a ruffle or fluting projecting below the bottom of the dress?

A. I did.

Int. 10. Will you look at Respondents' Exhibit 11 now offered in evidence and say whether that represents the dress or dresses so used by you having such protector and ruffling?

A. Yes, that is just the way—exactly the way—I put mine in.

Int. 11. Did you, during that two years, use an enameled-cloth protector, belonging to the dress that you described, without any ruffling?

A. Yes; I used it without and with the ruffle; the ruffle was for trimming or ornament.

Int. 12. State whether or not these enameled-cloth protectors operated successfully to protect the dress?

A. Yes, sir.

Int. 13. Please state where you got such protectors so used?

A. They were for sale in all the principal stores; dry-goods stores, trimming stores, &c.

Int. 14. Please state what led you to apply these protectors to your own dresses?

A. They were being used—universally used—and I used it for the purpose of protecting my dress; I came to use them the same as to use every new thing that comes up.

Int. 15. Can you fix the date of your first use of such protector, and if so, how?

A. It was in the summer of 1864—the spring or summer; I went South in the last week of October, 1864, and I had been wearing it then for some little time.

Int. 16. Will you state whether or not these protectors, like Exhibit 10, were manufactured by Mr. Griffiths in the year 1864, and afterwards?

A. I think they were; they were manufactured by him, and I think in those years.

CROSS-EXAMINATION by Mr. G. E. Betton, Esq.:

Cross-Int. 17. How do I understand you that this enameled cloth, like Exhibit 10, was attached to the facing?

A. I attached it after the manner of Exhibit 11, and in other manners.

Cross-Int. 18. Was the piece of enameled cloth sewed to the facing of the dress?

A. The binding of the enameled cloth was sewed to the facing of the dress, not the enameled cloth itself.

Cross-Int. 19. Was the bottom of the piece of enameled cloth sewed to the bottom of the dress?

A. No; I never bound it in.

Cross-Int. 20. Was it attached to the facing like Exhibit 11?

A. Yes.

Cross-Int. 21. For whom are you now manufacturing ruffling and laces?

A. I am in business for myself; I do business with Lewis, Brown & Co, Summer street, Boston.

Cross-Int. 22. Please state how you mean you do business for Lewis, Brown & Co.?

A. I sell them goods.

Cross-Int. 23. Who else do you sell goods to?

A. I decline to give the names of my customers; there are those present in the same business as myself, and I don't care to make my business public.

Cross-Int. 24. Your counsel has just stated that there is no objection to your answering the question; will you now answer it?

A. Sargent Bros., Brown, Durrell & Co.; no others at present.

Cross-Int. 25. You speak of Mr. Mandell manufacturing the same goods; do you mean Mr. Mandell of the firm of J. B. Babcock & Co.?

A. No; I mean Mr. Mandell of Blackmer & Mandell.

Cross-Int. 26. Are they manufacturing ruffling and laces?

A. I suppose they are; I was never in their work-rooms.

Cross-Int. 27. Are Sargent Bros. and Brown, Durrell & Co., the only persons you have sold your goods to since the fire?

A. No; I have sold Rogers & Shutz a few, and Burr, Taft & Co., who are not now in business; that is all I remember, excepting those I have mentioned.

Cross-Int. 28. Have you sold any goods to J. B. Babcock & Co, during that time?

A. No; I have done no business with them.

Cross-Int. 29. Have you any books of account that you kept before the fire?

A. No; everything was destroyed.

Cross-Int. 30. Do you mean that you kept some which were destroyed, or that C. W. Griffiths kept some that were destroyed?

A. I mean that Mr. Griffiths' books were destroyed, as I suppose; I had no occasion to keep any books myself.

Cross-Int. 31. When did you go into C. W. Griffiths' employ; in what year and month?

A. I can't recollect the year; I was there a very long time, but don't recollect the date nor even the year when I went there.

Cross-Int. 32. Can't you remember about how long ago it was?

A. I was there in 1864 I know, and had been there some little time, but I can't recollect the date.

Cross-Int. 33. Was it about the time you first went to Griffiths' that you put on this enameled cloth as a protector?

A. No; I didn't wear it then; I wore it in 1864 I know, but I didn't wear it when I first went to Mr. Griffiths'.

Cross-Int. 34. If you don't know when you went to Mr. Griffiths' how do you know how long after you went there it was before you put it on?

A. I don't know how long after I went there it was; I know I wore it in 1864, but I don't think it was wornwhen I first went to Mr. Griffiths'.

Cross-Int. 35. How many years were you at Mr. Griffiths' in all?

A. Well, ten or twelve years, I think, altogether; I am safe to say ten years.

Cross-Int. 36. I don't exactly understand your answer to the 34th cross-interrogatory; you say that you don't think protectors were worn when you first went there (to Mr. Griffiths'); do you mean by yourself, or by whom?

A. I didn't wear them myself when I first went there, and I don't know that they were worn.

Cross-Int. 37. Please state where you said Griffiths kept, and where he moved to?

A. It was at the manufactory in a wooden building in School street, near the Parker House—just below; I am miserable on dates, unless something fixes it in my mind; we moved from School street to 71 Congress street.

Cross-Int. 38. In what year did Griffiths keep in School street?

A. That I will find out; I can't tell it now; he kept there when I first went to work for him.

Cross-Int. 39. Can you tell when he moved to Congress street?

A. No, I can't; but I was there in 1864.

Cross-Int. 40. Where does Mr. Griffiths keep now?

A. In South street, I believe.

Cross-Int. 41. Are you sure you were in Congress street in the employ of Griffiths in 1864?

A. I am positive I was there in 1864.

Cross-Int. 42. You speak of C. W. Griffiths' manufacturing goods like Exhibits 10 and 11; can you tell when they first began to make those goods; in what year?

A. In 1864 and 1865; we didn't make them till we went to Congress street; we made them there.

Cross-Int. 43. How long after he went to Congress street was it that he began to make these goods?

A. That I can't tell, because I don't know the exact date of his going there.

Cross-Int. 44. Did you put these dress protectors like Exhibit 10, which you say you put on in 1864, on to straight-skirt dresses or gored-skirt dresses?

A. They had straight widths in the back, but gored at the sides.

Cross-Int. 45. How many straight widths in the back?

A. The skirt was from four to four and a half yards round: of course, the back widths were sloped a little at the bottom as it was a long dress.

Cross-Int. 46. Can't you tell, by reflecting, how many widths there were in the back?

A. I should think about four; it depends upon the width of the silk or the material of the dress.

Cross-Int. 47. How many gored breadths at the sides and front?

A. One in front and one at each side; of course, the front was gored.

Cross-Int. 48. When do I understand you that C. W. Griffiths made ready-made suits for sale?

A. The summer before the fire.

Cross Int. 49. When was it that Griffiths made those ruffles or plaited braids like Exhibit 11 for the first time?

A. Mr. Griffiths didn't make those plaited braids; I made it myself.

Cross-Int. 50. When?

A. I had it on dresses in 1864 and 1865; it was quite the style, and I had it on a large number of dresses.

Cross-Int. 51. Did not C. W. Griffiths make this braid into plaited trimming, for sale as trimming, and when?

A. He did not make it; people bought the braid and plaited it up themselves.

Cross-Int. 52. Are you sure Griffiths did not make this plaited trimming like Exhibit 11?

A. He made a silk trimming that was box-plaited and with two rows of stitches through the centre; that was put on to waists and sleeves, and on the outside of the bottom of dresses; that's all I remember of his making, and it was used as a trimming for the skirt, not as a protector; I don't think he made any like Exhibit 11, for I don't think we had machinery that would make it; the silk trimming we made in very large quantities, and I remember it; if they did make any like Exhibit 11 it must have been in very small quantity, and I don't remember it.

Cross-Int. 53. Was the silk trimming you speak of plaited by machinery—that made by Griffiths, I mean?

A. It was fluted by machinery, then pressed in the centre and brought into a scant flox plait; it was really fluted, but the process afterwards gave it the appearance of box plaiting.

Cross-Int. 54. Where, for the first time, did C. W. Griffiths & Co. make this fluted silk trimming?

A. When we were in School street.

Cross Int. 55. Where did Griffiths make this enameled cloth in School street or in Congress street?

A. In Congress street.

Cross-Int. 56. Can you tell in what year he made it for the first time?

A. I can't tell the exact year we went there; but I think we made it in 1864 and 1865; I am sure we made it in Congress street only.

Cross-Int. 57. You think it was in 1864 and 1865 that you put this on to dresses; did you continue to wear protectors like Exhibits 10 and 11 on your dresses in 1866 and 1867?

A. I didn't wear it so much; I used it occasionally in dresses, but not as much as before.

Cross-Int. 58. Why did you not attach the enameled cloth, as shown in Exhibit 11, directly to the facing instead of first to the binding and then the binding to the facing?

A. We bought it attached to the cambric, and I just made the cambric narrower, as I didn't want so much cambric.

Cross-Int. 59. Then, if I understand you, this enameled cloth attached to a piece of cambric, like Exhibit 10, was for sale for protectors in 1864, was it?

A. It was.

Cross-Int. 60. Can you state who had it for sale at that time?

A. In the principal stores where they sell that class of goods.

Cross-Int. 61. Can you name any one place where they had for sale as protectors such a piece of cambric attached to enameled cloth like Exhibit 10, in 1864?

A. They had it for sale at Churchill & Watson's, but I don't know that it was in 1864; I can't say where I bought it.

Cross-Int. 62. Did you buy yours in 1864 at Churchill & Watson's?

A. I can't state the exact place; it was commonly for sale in the stores.

Cross-Int. 63. Then I understand you that you can't tell in what store you bought your enameled cloth protector, like Exhibit 10, in 1864, nor in what principal stores it was for sale in that year?

A. No, I can't; it was such a simple thing that it made no impression upon my mind; the name they went by was dress facings, not dress protectors; we used them for dress protectors, however.

Cross-Int. 64. When you were in the employ of Griffiths in 1864, 1865 and 1866, were you employed on trimmings, or on ladies' suits?

A. On trimmings; we didn't make suits until the summer before the fire.

Cross-Int. 65. Did you continue to wear these enameled cloth protectors like Exhibit 11, more or less, until rubber protectors came into fashion?

A. I wore them very much in 1864 and 1865, and occasionally afterwards; then took a dislike to them, and didn't wear them for a long time.

Cross-Int. 66. Did you wear plain wiggan protectors when they came in fashion?

A. I have used wiggan between the facing and the dress to stiffen the bottom of the dress, but wore no waterproof protector with it.

Cross-Int. 67. My question is, if you wore plain wiggan protectors?

A. I didn't wear any protector, as I stated, when I wore the wiggan; that I used the same as a facing when I wore it plain like that.

Cross-Int. 68. Didn't you wear the rubber cloth protectors?

A. I haven't them in a single dress; I had one piece which I wore once or twice and took out.

Cross-Int. 69. How do you mean you took it out; was it put on like a facing?

A. I should have said taken it off; it was attached to the facing of the dress.

Cross-Int. 70. Was the article you bought in 1864, of enameled cloth, attached to a piece of cambric, just like these Exhibit 10 and 11?

A. Yes.

Cross-Int. 71. Do you know what this piece of cambric attached to the enameled cloth in Exhibit 10 is for; why is not the enameled cloth sewed directly to the facing of the dress?

A. It is for a double purpose; it would be a dress protector and a facing together, or the cambric could be made narrower and attached to the cambric of the dress for a separate protector. In my opinion the entire thing would be too narrow if used for facing, but would answer the above purpose of dress protector and facing combined.

Cross-Int. 72. Did you find any difficulty in putting on this kind of protector like Exhibits 10 and 11, as you have stated, in 1864, on to a gored skirt; did it set set well, without wrinkling?

A. I did not; I box plaited it and made it fit the bottom of the dress; I made it sit nicely.

Cross-Int. 73. Do you mean you box plaited the enameled cloth or the cambric?

A. Both; because it is on here for a binding, and if I box plaited one I would have to box plait the other; I box plaited both the cambric and the enameled cloth.

Cross-Int. 74. Did you box plait it on Griffiths' machinery?

A. No; I did it myself; as I put it on to my dress, fitting it as I went along, according to the curve of the dress.

Cross-Int. 75. Will you tell me what there was to plait of the cambric, if you say, as you have stated, that the cambric was cut off and turned over like Exhibit 11?

A. There is no plait in Exhibit 11, of course, because it is a very small piece; that is the way I put it on, laying the plaits as I went along, and of course the cambric had to be plaited with the enameled cloth.

Cross-Int. 76. You have stated all along heretofore that Exhibit 11 represented the manner in which you attached the enameled-cloth protector, have you not?

A. Yes; I say so now, only that is a small piece, and no curve

to it; of course my dress was not straight like that all around; that's the way I put it on.

Cross-Int. 77. Do I understand you then, that this, like Exhibit 11, was, or was not, the way that you put on this enameled-cloth protector l ke Exhibit 11, in 1864, or do you mean that it was fluted or plaited ?

A. This shows the manner of sewing the protector to the facing of the dress; that shows the stitches—the sewing portion —the piece there, Exhibit 11, being too small to show the manner of putting it on to show the plait.

Cross-Int. 78. I understand you to say that you are not a dress-maker; that that is not your business; so, I suppose, you do not make ball or reception dresses ?

A. No, I do not, except for myself.

Cross-Int. 79. Have you made ball or reception dresses for yourself ?

A. I have, a good many.

Cross-Int. 80. Do you finish your dresses with lining throughout, or with a facing merely ?

A. I finished my dresses of late years with a facing, but I have lined them throughout.

Cross-Int. 81. How did these enameled cloth protectors with a cambric attachment like Exhibit 10, which you say were generally on sale in 1864, come; I mean in pieces of what length and width ? Were they just long enough for a dress; if not, how long were these pieces ?

A. There being a difference in the width of dresses I would buy two and a half or three yards, and then put in the length that I wished: I used it only in the back part of the skirt; when I looked after the manufacture it used to be in rolls of twelve yards, so I suppose they sold it in that way,

Cross-Int. 82. Was it marked when it was done up in rolls "dress facings," and anybody's name on it as patentee or manufacturer ?

A. Yes, there was something on it; I couldn't tell what the label was, but I knew it was a patented article.

Cross-Int. 83. Was it marked "dress facings ?"

A. I don't know that it was marked "dress facings," but it was called so, and sold as a protector, and that's what we used it for.

Cross-Int. 84. How do you mean "we used it for "—who ?

A. It was generally used—ladies generally used it.

Cross-Int. 85. Did Griffiths make it and sell it as dress protector in 1864 ?

A. It was a patented article; he took a contract to make it from Mr. Magee, as he (Mr. Magee) couldn't make it fast enough.

Cross-Int. 86. Have you been able to recollect yet when you went into the employ of Griffiths ?

A. No, haven't; I I can find out the exact date; I can furnish, if it is necessary, all the dates asked for; that is, if it should become necessary, I can look them up.

DIRECT-EXAMINATION resumed:

Int. 87. In whose employ were you when you went to the South, in 1864?

A. Mr. Griffiths'.

Int. 88. Where was Mr. Griffiths' place of business at that time?

A. 71 Congress street.

Int. 89. What was the occasion of your going south at that time?

A. I went there to bring home Mr. Mellus, who was lying sick at New Hollowell Hospital, Alexandria, Virginia. He was First Lieutenant in the 4th Massachusetts Heavy Artillery. Was taken sick with malarial fever, and lying very dangerously ill.

Adjourned to 27th at 10.15 A.M.

ANNIE E. MELLUS.

Attest: N. AUSTIN PARKS,
Special Examiner.

DEPOSITION OF JAMES G. BOWDEN.

April 26, 1875.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq.

Int. 1. State your name, age, residence and occupation.

A. James G. Bowden; age, thirty-nine years; residence, Marblehead, Mass. I am agent for a New York house, Herrman, Aukam & Co., manufacturers of fancy goods, trimmings, &c. I have been in that business five years.

Int. 2. During that time have you sold skirt protectors for ladies' dresses?

A. I have; some made with waterproof and some without.

Int. 3. Look at Respondents' Exhibit No. 12, now offered in evidence, and state whether or not you have sold skirt protectors the same as that; and if so, when first.

A. I sold it the first time, I think, November 8, 1873. This date I get from my sales book. I have sold them quite largely from that time until within six months; since that I have sold something very similar, but very little. I have sold very little, if any, since of any kind. I have sold mostly to wholesale dealers, and also to houses having retail departments. I know I sold them November 8, 1873.

CROSS-EXAMINATION by G. E. Betton, Esq.

Cross-Int. 4. Are, or were, Herrman, Aukam & Co., manufacturing skirt protectors at Troy, N. Y.?

A. I think they were. I am not positive; I was never at the factory.

Cross-Int. 5. Were they manufacturing under any patent or license during this time?

A. I understood they paid a royalty to a man in New York for the privilege of manufacturing it.

Cross-Int. 6. To whom?

A. M. Berliner.

Cross-Int. 7. Was Berliner the assignee or purchaser of J. Jenkinson's patent?

A. I don't know.

Cross-Int. 8. Were these goods marked patented; if so, what was the mark and date of the patent?

A. I am not certain.

Cross-Int. 9. You say you have sold goods for protectors like Exhibit 12 since November, 1873, and don't know whether they are marked patented or not?

A. My impression is they were not, although I am not certain, it is so long since I have sold any.

Cross-Int. 10. And do I understand you to say that you have no knowledge whether they were patented or not by J. Jenkinson?

A. I have not.

Cross-Int. 11. Were all the protectors that you sold, from and after November, 1873, exactly like Exhibit 12?

A. No, sir.

Cross-Int. 12. How did they differ?

A. Some were made of all wiggan; others similar to Exhibit 12, but with imitation rubber or enameled cloth.

Cross-Int. 13. What is this Exhibit 12?

A. The bottom is rubber cloth.

Cross-Int. 14. Does your sales-book, that you speak of, specify the different kinds, describing them, that were sold by you since November, 1873?

A. Yes, sir.

Cross-Int. 15. Does Herrman, Aukam & Co. still continue to make and sell goods or protectors, like Exhibit 12, under license from Berliner.

A. I think they are not making them at all.

Cross-Int. 16. Have you those salesbooks you refer to with you? If so, please produce them.

A. I have one book.

Cross-Int. 17. Would not the word "noiseless," as appears in your books, embrace enameled cloth protectors, in part or in whole, as well as india rubber or imitation india rubber?

A. We may have called them noiseless, or noiseless waterproof. 'Tis very likely I may have entered them without any distinctive title, merely calling them protectors. The price, as entered on my books, would indicate to me what they were, whether rubber or imitation. I feel quite sure that the rubber goods were entered "noiseless."

Cross-Int. 18. Now what I desire to ascertain is, as the entry in your book, under date of November 8, 1873, is "noiseless" merely, whether that may not have been enameled cloth or imitation rubber?

A. I am quite certain that it was rubber.

Cross-Int. 19. Then after all, you have to rely upon your memory about that, do you not?

A. My memory and my book.

Cross-Int. 20. But your memory supplies what is wanting in the book, does it not?

A. I suppose it does.

Cross-Int. 21. If enameled cloth was used, was it like Exhibit 7, only of different colors?

A. I shouldn't think it was exactly like this; still it was very similar. It resembled india rubber more than this does.

DIRECT-EXAMINATION resumed:

Int. 22. Were the goods sold by you November 8, 1873, of rubber, or enameled cloth?

A. I am quite sure they were rubber cloth, like Exhibit 12, or cloth enameled with rubber. I mean that it was like Exhibit 12, whether that be rubber cloth or cloth enameled with rubber. I am not an expert in the fabrics enough to tell which it should be called. When I speak of "imitation rubber cloth" I mean something that resembles the rubber very closely.

JAMES G. BOWDEN.

Attest:

N. AUSTIN PARKS,
Special Examiner.

DEPOSITION OF WILLIAM CLAPP.

APRIL 27, 1875.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq.

Int. 1. State your name, age, residence and occupation.

A. William Clapp; age, fifty-eight years; residence, Boston, Massachusetts; I am a merchant, keeping a thread and trimming store.

Int. 2. How long have you been engaged in that business?

A. I have been in business for myself twenty-seven years—in that business.

Int. 3. Look at Respondents' Exhibit No. 7, and state whether or not in the course of your business you have ever sold enameled cloth like that, and if so, for what purpose?

(Objected to as immaterial and irrelevant.)

A. I have, and for skirt protectors.

Int. 4. Please state what time you began to sell such enameled cloth for that purpose, and in what form it was sold, and to whom?

(Objected to as above.)

A. I should say as early as 1862, in strips from three to four inches wide of indefinite lengths; pieces bought not all the same length—from one and one-half to two and one-half yards. I could not name any person. I couldn't specify names. I sold it to my customers as they called for it. The rolls in which it came were from ten to twelve yards long.

Int. 5. How long did you continue to sell this enamelled cloth for dress protectors?

A. I should say for three years. We sold it in quite large quantities at first.

Int. 6. Have you ever sold any other dress protectors?

A. I have, at various times, since that time.

Int. 7. Look at Respondent's Exhibit No. 10 and state whether or not you have sold dress protectors made of enamelled cloth like that exhibit; if so, during what years and to what extent?

A. I have; I should say from 1865 to 1868, in large quantities for a retailer.

Int. 8. Please describe any other dress protectors that you have sold, and give the years as nearly as you can?

A. I have sold them made of different materials from '66 up to the time of the more modern skirt protectors. It has been hair cloth, moreen, and perhaps other things to take the place of what we sold before that. There has been no time from that time to the present but what I have retained in my shop something in the shape of a skirt protector. They have varied in form from time to time according to the fashion. Sometimes plain and sometimes fluted. I mean that I have sold skirt protectors from 1862 to the present time, one thing following another, according to the fashion.

CROSS-EXAMINATION by G. E. Betton, Esq.

Cross-Int. 9. You say you sold protectors like Exhibit 7 in 1862; were they of the same color and substance as that exhibit?

A. This was the same substance, but of a variety of colors.

Cross-Int. 10. You say it came in rolls; was it marked skirt facing, or skirt protectors?

A. I don't remember as there was any mark upon it at all.

Cross-Int. 11. You say these protectors like Exhibit 7 were about how wide?

A. I should say from three to four inches wide.

Cross-Int. 12. I believe you said you sold them for protectors in 1862, in lengths of one and one-half to two and one-half yards?

A. As near as I can remember, that is correct.

Cross-Int. 13. Have you any books of account showing that you sold these protectors in 1862; if so, where are they?

A. I have not. Books so far back I have not preserved.

Cross-Int. 14. Of whom did you buy these protectors like Exhibit 7 in 1862?

A. I can only swear from memory. I think C. E. King & Co., of Boston, were one party, and Burr Brothers another.

Cross-Int. 15. Can you name any person that you sold protectors like Exhibit 7 to in 1862?

A. I don't know that I could. Probably not one-tenth part of my customers I know by name.

Cross-Int. 16. Are Burr Brothers in business now?

A. They are not.

Cross-Int. 17. In what years were hair-cloth protectors sold?

A. I couldn't say. It was between the time that protectors like Exhibit 10 were sold, and the time of the present styles.

Cross-Int. 18. Did you buy protectors like Exhibit 7 of any other parties than C. E. King & Co., and Burr Brothers?

A. I could name no other parties now. None to my recollection.

Cross-Int. 19. Do you mean by your answer to 17th Cross-interrogatory that you sold hair-cloth protectors between 1865 and 1873, or between what years?

A. Yes; I sold them between '65 and '73. That is, not exclusively, but in connection with other styles.

Cross-Int. 20. Did they come fluted or plaited in 1865; that is, the hair-cloth protectors?

A. No, they did not.

Cross-Int. 21. Did they in 1866 or 1867?

A. I have no recollection of it. They usually were plain.

Cross-Int. 22. Have you any distinct recollection that they came plain in 1866 and 1867?

A. I could't swear to that. My impressions are that they were plain.

Cros-Int. 23. Was the sale of protectors on an average, of about the same quantities, between 1865 and 1873?

A. I should think there was not as much sale during that time; but at no time had it entirely ceased.

Cross-Int. 24. Would the proportions of sales vary very much?

A. They would, I think.

Cross-Int. 25. How were these hair-cloth protectors sold between the years 1865 and 1873; of what width and length?

A. Of about the same length as we sold before; one and one-half to two and one-half yards, and some a little wider than from three to four inches.

Cross-Int. 26. Where and in what years were moreen protectors sold?

A. I couldn't state the years, but that was one of the styles sold in connection with the hair-cloth and others.

Cross-Int. 27. Do you mean that moreen protectors were sold between 1865 and 1873, or in what year?

A. They were confined to no particular year, but were sold in connection with the other materials which are sold for skirt protectors; that is, hair-cloth, this (Exhibit 10) and plain emamelled cloth. We retained them in stock all at the same time during those years.

Cross-Int. 28. Do you mean that you had moreen protectors on hand and sold them at the same time with hair-cloth protectors, or how otherwise?

A. Well, that was one of the kind that I had in connection with he others.

Cross-Int. 29. When did you sell the skirt protectors made of wiggan?

A. I could not positively state.

Cross-Int. 30. Who did you buy your hair-cloth skirt protectors of?

A. I couldn't swear to that; I am not positive.

Cross-Int. 31. In what lengths and how wide were they sold for skirt protectors?

A. We sold in pieces of from one and a half to two and a half yards, and I should say, from four to five inches wide.

Cross-Int. 32. When did you commence to sell wiggan for skirt protectors; in what year?

A. I am not positive, but I should think I had sold them from four to five years.

Cross-Int. 33. Were they sold in the same lengths and widths as the others?

A. Very similar.

Cross-Int. 34. Were they marked "patented," and by whom?

A. I think they were not.

Cross-Int. 35. Was this Exhibit 10 sold with the cambric attached; and was that marked "patented," and by whom?

A. This was marked "patented" and sold, I think, under a patent owned by Mackee. It was sold, as in the exhibit, with the cambric attached.

Cross-Int. 36. Are you positive you sold these wiggan protectors four or five years ago?

A. To the best of my knowledge and belief; I couldn't swear about it?

Cross-Int. 37. Have you any books to show what years you sold these hair-cloth or wiggan protectors or moreen?

A. I have no books which specify it in that way, and don't know that I have in any way. The bills are not extended in my invoice book, and consequently they don't specify what the merchandise is, the items not being enumerated.

Cross-Int. 38. Have you sold water-proof protectors, and when for the first time?

A. I have for several years; I can't state the exact time; I have sold them since they have been introduced.

Cross-Int. 39. Have you sold them like Complainant's Exhibit 4, and when for the first time?

A. I have sold like this or very similar. I couldn't state the time, except that I have sold them since this kind of goods were introduced. I buy all kinds of goods when they come into the market, and sell them, no matter whose make or what kind it is.

Cross-Int. 40. Can you state pretty near, from your recollection, about how long these goods like Exhibit 4 came into the market?

A. Well, I should say from two to three years; I understand this style, Exhibit 4, followed the wiggan, fluted in that way.

Cross-Int. 41. You say you sold goods like Exhibit 10, on Mackee's patent from 1865 to 1868 in large quantities; do you remember who you purchased them of?

A. I think I bought some of Mackee, himself, and I think some of Churchill & Watson.

Cross-Int. 42. Where was Mackee's place of business?

A. He was in my employ for about six months; previous to that I believe he was with Churchill & Watson.

Cross-Int. 43. What time was Mackee in your employ?

A. I couldn't swear to the precise date without referring to my books; it was in 1866 or 1867.

Cross-Int. 44. Do you remember when, or about when, you bought protectors, like Exhibit 10, of Mackee?

A. It was before he came with me; I should say at least a year, or a year and a half, and possibly two years.

Cross-Int. 45. You say, if I understand you, that the wiggan protectors came at the same time with Mackee's and the hair-cloth protectors and the moreen protectors in the market?

A. Those followed this one, Exhibt 10; this was earlier than any of these.

Cross-Int. 46. Did the wiggan protectors follow the Mackee?

A. As near as I can remember the wiggan followed this Exhibit 10; it was one of the earliest of the modern kind; some of the hair-cloth and of the moreen was sold at about the same time, and before the modern kind was introduced; I always kept the goods like Exhibit 10 in stock until the new kind came in, and I may have some now.

Cross-Int. 47. By the new kind you mean that like Exhibit 4, do you?

A. There was a plain wiggan before that; that is, without any waterproof binding; it was, I mean, of no combination, but all wiggan; it may have been plaited.

Cross-Int. 48. Then, as you say that Mackee's, like Exhibit 10, came in in 1865 and continued for three years, and the fluted or plaited wiggan followed, that would make it that the fluted or plaited wiggan came along in 1869, would it not?

A. No, I don't mean to convey any such idea, I meant that I sold this like Exhibit 10 in large quantities from 1865 up to the year 1868, and in small quantities until the new styles came in use.

Cross-Int. 49. Now, when do you make it out that the Mackee patented protectors in substance ceased, and the fluted or plaited improvement came in; in what year?

A. I don't understand that it was ever entirely extinct until the present style has crowded it out of market.

Cross-Int. 50. Then what did you mean when you said that you sold the Mackee in large quantities between 1865 and 1868. Did not some protector come along to cause Mackee's protector to sell less in amount, and if so, was it the wiggan, or the hair-cloth, or what?

A. No, sir; I don't know that any particular kind came along, but the fashion for wearing protectors may have changed; I don't mean to say that none were sold, but less in quantity.

Cross-Int. 51. Did you sell any of this enamelled cloth, Exhibit 10, for facing in 1865 or before that?

A. I should think we sold it earlier than that, but not so early as the other, Exhibit 7.

Cross-Int. 52. Did you sell enamelled cloth like Exhibit 7 for facings in 1862?

A. I did not sell it for facings as I understood it; we sell an ordinary cambric for facings.

Cross-Int. 53. You say you sold enamelled cloth like Exhibit 10 for facings earlier than 1865 but not as early as Exhibit 7; about what year did you sell enameled cloth like Exhibit 10; between 1862 and 1865?

A. I never sold them as facings but as protectors; a facing is an ordinary cambric going around the dress.

Cross-Int. 54. Is Exhibit 10 a facing, or a dress protector, as you understood it?

A. A dress protector.

Cross-Int. 55. How about moreen; did that extend around the skirt?

A. No, sir; that was used as a protector.

Cross-Int. 56. Did the hair-cloth you have spoken of extend around the skirt?

A. No, sir; it did not.

DIRECT-EXAMINATION resumed:

Int. 57. What was the first kind of dress protector you sold?

A. That like Exhibit 7.

WM. CLAPP.

Adjourned to 28th, at 10.15 A. M.

Attest:

N. AUSTIN PARKS,
Special Examiner.

DEPOSITION OF JOHN HARRINGTON.

APRIL 28, 1875.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq.:

Int. 1. State your name, age, residence and occupation.

A. John Harrington; age, forty-two years; residence, Somerville, Massachusetts; I am a dealer in hosiery and small wares in Boston; my store is in Tremont row; my firm, John Harrington & Co.

Int. 2. How long have you been in that business, and where?

A. For nineteen years. For eight years in Somerville, and for eleven years in Boston.

Int. 3. During that time have you sold protectors for the skirts of ladies' dresses?

A. I have, of various kinds.

Int. 4. Look at Respondents' Exhibit 10 and say whether or not you have, during that time, sold dress protectors the same as that; and if so, when you began to sell such protectors.

A. I should say in 1867.

Int. 5. How do you fix the year of your beginning to sell such protectors?

A. We came to Boston in May, 1864. I don't wish to antedate the time of my selling them. I am quite sure of selling them before the time I have mentioned—1867. My first recollection about dress-protectors is in 1860, when I sold strips of enamelled cloth three to four inches wide for dress protectors by the yard.

I bought them in rolls of about twelve yards in length. The next thing I remember is this thing, No. 10. I sold it in various lengths as the customer wished to buy. It came in rolls of ten or twelve yards in length.

Int. 6. How much of the article like Exhibit 10 did you sell, as nearly as you remember?

A. I can only approximate it. I am sure of having sold more than twenty pieces in 1867.

Int. 7. Since 1867 have you sold other kinds of skirt protectors; if so, what kinds, as nearly as you can describe them, and how have they differed one from the other?

A. Various kinds; some of enamelled cloth, some of wiggan, some of rubber cloth, some plain, some plaited, some gored; being governed somewhat by the fashion?

Int. 8. Since you commenced selling dress protectors have you or not kept on hand for sale a stock of them of different kinds, varying according to the fashion?

A. I have.

CROSS-EXAMINATION by George E. Betton, Esq.

Cross-Int. 9. Who did you buy articles like Exhibit 10 of in 1867?

A. Various parties. Churchill & Watson and Lewis Coleman & Co., and other small-ware jobbers.

Cross-Int 10. You say articles like Exhibit 10 came in rolls ten or twelve yards in length; was it marked "patented," and whose patent?

A. I should say not.

Cross-Int. 11. Was there any mark upon the rolls?

A. I should say not; they were rolled up and a string tied around them,

Cross-Int. 12. Do you know whose patent that is, made like Exhibit 10?

A. The only knowledge I have of that being patented is a circular we received about November, 1874—I am not positive as to the month—notifying us that one Macdonald claimed it as patented.

Cross-Int. 13. Did you sell articles like Exhibit 10 in 1874?

A. No, sir; what I meant by my last answer was, I did not know that cambric and enameled cloth put together was patented, or any of this stuff—rubber and cambric and enameled cloth and cambric. The first patent I remember was plaided wiggan in strips, woven in plaids.

Cross-Int. 14. Whose patent was that?

A. Mackee.

Cross-Int. 15. In what year did that patent come out?

A. I don't know anything about the date of it.

Cross-Int. 16. Do you know whether or not that Exhibit 10 is Mackee's patent?

A. No, sir; I do not.

Cross-Int. 17. Was the enameled cloth you say you sold in 1860 like Exhibit 7, or did you sell any like that in 1860?

A. I did.

Cross-Int. 18. Have you any books of account showing such sales in 1860?

A. No, sir.

Cross-Int. 19. Who did you buy enameled cloth of like Exhibit 7 in 1860?

A. I can't remember.

Cross-Int. 20. When were wiggan skirt protectors sold; in what year?

A. I should say they followed this material, Exhibit 10.

Cross-Int. 21. You say you sold protectors like Exhibit 10 in 1867; how long after did the wiggan protectors follow; I mean all wiggan?

A. I can't say; not to swear positively about it.

Cross-Int. 22. About how long after; plaided or plain?

A. The plain we sold more or less all the time. We sell it to-day; I should say it was about a year after; it might have been two after this Exhibit 10 had its day; the plaided wiggan followed about a year, I should think, after 1868.

Cross-Int. 23. Then you sold, if I understand it, articles like Exhibit 10, from 1867 until a year after 1868, when plaided wiggan came along?

A. I couldn't say positively.

Cross-Int. 24. Was any other kind of protector, except like Exhibit 10, sold between 1867 and 1869?

A. We bought the usual variety of them offered, and sold them; probably there were other kinds.

Cross-Int. 25. What other kinds?

A. I can't state positively.

Cross-Int. 26. When did plain wiggan (not plaided) plaited or fluted come into fashion for the first time?

A. I should say twelve or fifteen years ago.

Cross-Int. 27. Did you sell moreen skirt protectors, and if so, when?

A. I have; that was twelve or fifteen years ago.

Cross-Int. 28. Do you remember of whom you bought your plain wiggan skirt protectors (not plaided) but plaited or fluted, twelve or fifteen years ago?

A. Of various dry goods jobbers; wiggan is a common article of merchandise, and could be bought of any of them.

Cross-Int. 29. Of whom did you buy moreen skirt protectors twelve or fifteen years ago?

A. I remember C. F. Hovey & Co. as one house, and of other jobbers.

Cross-Int. 30. In what lengths did you sell skirt protectors of enameled cloth like Exhibit 7 in 1860; you say they were three or four inches wide; of what length did you sell them?

A. From one and one-half to four and one-half yards; of various lengths.

Cross-Int. 31. Can you tell how the quantity you sold, as you say, like Exhibit 10, in 1867 and 1868, compared with the quantity sold before that time or after?

A. We sold more before 1867 than after.

Cross-Int. 32. In what lengths did you sell skirt protectors like Exhibit 10 in 1867 and 1868, and how wide?

A. In various lengths, as customers desired; the width substantially as in that sample, Exhibit 10.

Cross-Int. 33. You say you sold protectors in 1860 from one and one-half to four and one half yards in length, and from three to four inches in width; did you sell protectors like Exhibit 10, of about the same length and the width like Exhibit 10, in 1867?

A. Yes, like Exhibit 7 in 1860 of those lengths, and in 1867 like Exhibit 10 of the same lengths.

Cross-Int. 34. When did you first commence to sell protectors like Complainant's Exhibit 4?

A. About two years ago.

Cross-Int. 35. How did this enameled cloth like Exhibit 7, in 1860, come as to colors; do you remember?

A. Green, black, slate.

Cross-Int. 36. Do you remember in what lengths you sold these skirt protectors in 1870? I mean any kind you were selling at that time, including No. 10.

A. Of various lengths; whatever a customer desired.

Cross-Int. 37. You have stated the lengths of skirt protectors sold in 1860; now were the same lengths sold in 1870?

A. Substantially; we sold what they wanted to buy.

Cross-Int. 38. Do you mean to say by "substantially," that the lengths were about the same, or not?

A. About the same.

Cross-Int. 39. You say you have no books of account relating to these matters you have testified to, and you have to rely upon your memory, do you?

A. I do.

Cross-Int. 40. What do you call Exhibit 10, a skirt protector, or skirt facing?

A. Either.

Cross-Int. 41. Can't you remember any person that you bought enameled cloth of like Exhibit 7 in 1860?

A. I cannot.

Cross-Int. 42. It was for sale generally in the stores, was it, in 1860?

A. I should say yes.

DIRECT-EXAMINATION resumed.

Int. 43. You say that you have no books of account showing your sales in 1860; where are they?

A. Sold for old paper.

Int. 44. Was your business cash or credit at that time?

A. Mainly cash retail business; my invoice will never show items of merchandise; simply the firm name of the party of whom I buy merchandise, and the amount bought.

Int. 45. Would your books show the names of retail cash customers, or the goods sold such customers?

A. No, sir; we have a few small family credit accounts, but a very small number compared to the business.

JOHN HARRINGTON.

Attest:

N. AUSTIN PARKS,
Special Examiner.

APRIL 28, 1875, 2 o'clock P.M.

[Witness, with consent of counsel for both parties, adds the following]:

Since signing the foregoing deposition, and the adjournment following, I desire to say that on reading the questions and answers, cross 26 and cross 28, I find that I was in error in my answers to the same. I intended to say that I bought plain wiggan for protectors or facings twelve or fifteen years ago, but not plaited or fluted.

JOHN HARRINGTON.

DEPOSITION OF MARY E. HAZELWOOD.

APRIL 28, 1875.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq.

Int. 1. State your name, residence and occupation.

A. Mary E. Hazelwood; residence, Cambridgeport, Massachusetts; I am forewoman in Blackmer & Mandell's establishment for manufacturing ruffling, &c., I have been so since the fall of 1873—October, 1873—to the present time.

Int. 2. Have you ever used dress protectors to protect the skirt of your dress?

A. I have.

Int. 3. Have you ever used on your dresses protectors like repondents' Exhibit 10; if so, when and for how long?

A. I have; I wore it the first time in 1865, and after that I wore it in 1867; not with every dress, but right along as I chose to put it on.

Int. 4. Please state how such protector, or this protector, was put on to the dresses on which you wore it.

A. My dresses were faced with cambric and bound round the bottom with braid, and then I put the protector even with the braid on the wrong side of the dress, and sewed it by the cambric at the top of the protector, fast to the facing of the dress, not through the dress; by the wrong side of the dress I mean the side that comes next the sidewalk; by even with the braid, I mean that the bottom of the cloth came even with the bottom of the braid upon my dress.

Int. 5. Look at Respondents' Exhibit 13 (now produced in evidence) and state whether or not it represents the way in which you attached to the skirt of your dress this protector of which you have spoken?

A. It does; it represents the manner in which I put it on; it is

not the same color, nor is the dress the same color or material, but the material of the protector is the same; the color of the dress was black, and the protector was black; the first skirts I put it on were plain skirts; the others, or some of them, were gored.

Int. 6. How long did you use such dress protectors on your dresses?

A. From 1865 until 1867; I put it on to see how it would wear and to save my dress at first, and I used it a longer or shorter time as I chose; after I found it would protect my dress.

Int. 7. Please state whether or not these protectors so used by you on your dresses served to protect satisfactorily the skirts of dresses on which they were put?

A. They did.

CROSS-EXAMINED by G. E. Betton, Esq.

Cross-Int. 8. Would not the edge of the enameled cloth protector put on as you have described, like Exhibit 13, fray out and present a bad appearance with the white threads hanging?

A. I never knew it to fray out; it always wore evenly when I wore it; I never saw any white threads, if there were any; I suppose they get dirty; I never saw any.

Cross-Int. 9. You wore this kind of protector like Exhibit 13 in the street, did you?

A. I did.

Cross-Int. 10. And from 1865 to 1867?

A. I did, but not constantly.

Cross-Int. 11. Did you wear it until the protector was worn out?

A. Yes, I did.

Cross-Int. 12. And yet you say that it didn't fray out or show white threads when you wore it?

A. I suppose it wore to pieces like anything would wear scratching on the ground, or I may say like any protector I have worn since.

Cross-Int. 13. Now please answer my question whether or not the enameled cloth protector like Exhibit 13, attached as you have described, and worn as you have stated, until worn out, did or did not fray out on the lower edge and show white threads?

A. I don't know how I can answer it any plainer; I have expressed it the best I know how; it wore out, but I never saw any white threads.

Cross-Int. 14. Was the dress very long, and did it drag on the sidewalk?

A. It was quite long and dragged on the sidewalk.

Cross-Int. 15. How many yards did you usually buy of this protector like Exhibit 13?

A. I think I had about two yards in my dress.

Cross-Int. 16. What kind of protector did you wear after this, in 1867 and 1868?

A. In 1867 I wore that same kind; I don't remember as I wore much protector in 1868; I got tired of it.

Cross-Int. 17. Did you never wear any after 1867?

A. I have.

Cross-Int. 18. When, and what kind were they?

A. I wore it in 1873, and up to the present time; I have worn it some but not right along.

Cross-Int. 19. Did you wear any in 1871 and 1872?

A. I did not.

Cross-Int. 20. What did you wear in 1873; what kind?

A. I wore the nonpareil.

Cross-Int. 21. How was the nonpareil made; describe it?

A. It was a plain strip of wiggan bound with rubber.

Cross-Int. 22. Did you put this protector like Exhibit 13 on to a gored skirt?

A. Yes, I did.

Cross-Int. 23. You say you worked with Blackmer & Mandell since the fall of 1873 to the present time; where did you work before that?

A. For C. W. Griffiths & Co., for about ten years.

Cross-Int. 24. Where did C. W. Griffiths & Co. keep; I mean where was their manufactury, and had they a store besides that?

A. Their manufactory, when I first worked for them, was in School street; their store at 16 Milk street.

Cross-Int. 25. In what year was it that you went into their factory in School street?

A. In 1862; I know this from the fact that my father had enlisted in the army and was going away; their factory was opposite City Hall avenue, and I think was number 22, but am not sure of this; the building is torn down since, and I think there is a clothing store now in the same place.

Cross-Int. 26. Did Griffiths & Co. manufacture all their goods in School street?

A. They did not.

Cross-Int. 27. Where else did they manufacture?

A. Up over their sales-room on Milk street, No. 16 upstairs.

Cross-Int. 28. Did you remain with them until you went to Blackmer & Mandell's?

A. No, I did not; I did until September, 1872, and then I went to work for John A. Whipple, photographer, until February, 1873; then I went to work for Mr. Griffiths until the fall of 1873, and then left and went to Blackmer & Mandell's.

Cross-Int. 29. Did you go to work on skirt protectors when you first went to Blackmer & Mandell's or on ruffling or what?

A. On skirt protectors.

Cross-Int. 30. Of what kind?

A. Plaited wiggan and nonpareil.

Cross-Int. 31. You say you worked with Griffiths while they had work, until September, 1872, in School street, and then went to Whipple's, and then again to Griffiths'; when you went back did you go to School street or to 16 Milk street?

A. I went to 221 Washington street from Whipple's; I didn't work all those years for Griffiths in School street, for he wasn't there all those years.

Cross-Int. 32. Did you work at 16 Milk street?

A. I did not; I worked at 71 Congress street and 161 Pearl street for Mr. Griffiths, and 221 Washington street.

Cross-Int. 33. When did Griffiths move to 71 Congress street?

A. I can't tell you just when he moved to 71 Congress street.

Cross-Int. 34. When did he move to 161 Pearl street?

A. I can't tell you that, either.

Cross-Int. 35. Or 221 Washington street?

A. Well, at 221 Washington street, he moved some time in December, 1872.

Cro s-Int. 36. What kind of work did you do at Griffiths?

A. Do you mean all the time I was there? He made various kinds of work.

Cross-Int. 37. The question is, what kind you worked on?

A. I worked on collarettes, rufflings, dress protectors or dress protector, I suppose, ruchings, nubias and nets for the hair.

Cross-Int. 38. Was there any mark on these protectors, and how were they done up; who did he make them for and what quantities did he make. and in what year?

A. There was a mak but I can't say what it was; they were rolled up; I can't tell you who he made them for; I did not get out the work; my place was to make the work, and I don't know in what quantities he made them. The first dress protector I worked on for him was in 1865.

Cross-Int. 39. Were they marked when rolled up "patented?"

A. I can't tell you; I didn't roll them up; I made them or stitched them together.

Cross-Int. 40. Does Exhibit 10 show the way you made them?

A. Shows the way I made them in 1865.

Cross-Int. 41. How do you remember these dates when you first made these protectors?

A. From circumstances that occurred at the time. The way I know that I made it was from the fact that I was wearing mourning for my father, and I put it in a black dress in the first place.

Cross-Int. 42. That is the way you know when you put it on your dress; my question was, how do you know that you made the first one at Griffiths' in 1865?

A. From the fact that I was wearing mourning for my father, and I wanted to keep the dirt from going through on a black dress.

Cross-Int. 43. When did your father die?

A. He died Jnnuary 27, 1864.

Cross-Int. 44. Did you get the first protector you put on like Exhibit 10 at Griffiths'?

A. I did.

Cross-Int. 45. And did you put it on your first mourning dress?

A. I didn't put it on the first mourning dress; my father was dead a year, so it wasn't the first one.

Cross-Int. 46. Didn't Griffiths commence to manufacture

skirt protectors like Exhibit 10, until 1865, and what time in 1865?

A. I don't know when he first commenced to manufacture them, because I worked on different kinds of work.

Cross-Int. 47. How long did you continue to work on different kinds of work until you began to work on these skirt protectors?

A. Well, I can't say, for the reason that I might work on one kind of work one day, and on another the next.

Cross-Int. 48. What I asked was, how long you continued to work on other kinds of work before you went to work on skirt protectors like Exhibit 10?

A. I don't know.

DIRECT-EXAMINATION resumed.

Int. 49. You have spoken of nonpareil protectors; will you look at respondents' Exhibit 8, and state whether or not that is what you mean by nonpareil protector?

A. This is one kind of nonpareil.

Int. 50. Will you please look at defendants' Exhibit 14, N.A.P., Examiner, and state whether or not that also is what you referred to as nonpareil?

A. It is.

Int. 51. You say that you got tired of protectors like Exhibit 13; state what the objection to them was, if any?

A. There isn't any objection.

Int. 52. Why did you tire of them?

A. Because I didn't think they were necessary for the dress.

Int. 53. How long did you wear mourning for your father?

A. Two years and a half.

Int. 54. Where was Mr. Griffiths' place of business when you used your first protector on your dress?

A. 71 Congress street.

MARY E. HAZELWOOD.

Attest:

N. AUSTIN PARKS,
Special Examiner.

DEPOSITION OF CHARLES FRANCIS.

APRIL 29, 1875.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq.:

Int. 1. State your name, age, residence and occupation.

A. Charles Francis; age, forty-nine years; residence, Chestnut Hill, Massachusetts; occupation, treasurer of the Salisbury Mills, at Amesbury, Massachusetts.

Int. 2. What was your business before you were treasurer of the Salisbury mills?

A. I was in the commission business when last in business; but for two or three years preceding I had been out of business; I went out of business in December, 1869; since then have been

in no business until last June when I took the treasurership of the Salisbury mills.

Int. 3. How long were you in the commission business in Boston; from what year to what year?

A. From 1863 to 1869.

Int 4. Will you look at Respondents' Exhibit No. 10, and say whether or not, while you were in commission business in Boston, you sold an article of that kind and to what extent, and when you began to sell it and for what purpose?

A. I can't give the exact dates, because my books were burnt up; but it was some time between '64, '65 and '66; it was sold for dress facings; I should think the sales of it would amount to $40,000 or $50,000 during that time; it was sold both to jobbers and to retailers; as near as I can remember I should think the most of the business was done in 1865.

Int. 5. In what form did you sell the article like Exhibit 10; how was it put up?

A. It was put up in boxes, I think, of three pieces in a box, in rolls made of cambric and enameled cloth as Exhibit 10 is, and of various colors.

CROSS-EXAMINATION by George E. Betton, Esq.:

Cross-Int. 6. Do you know who manufactured this article like Exhibit 10?

A. It was manufactured under the direction of Mr. Mackee.

Cross-Int. 7. Was it marked "Jas. A. Mackee's patent?"

A. If my memory serves me right it was called "the combination facing." I don't remember anything else, whether there was or not.

CHARLES FRANCIS.

Attest:

N. AUSTIN PARKS,
Special Examiner.

DEPOSITION OF NANCY H. TRAFTON.

APRIL 30, 1875.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq.:

Int. 1. State your name, residence and occupation?

A. Nancy H. Trafton; residence, Boston, Mass., at the corner of Essex and Washington streets; I am a dressmaker.

Int. 2. How long have you been in the business of dressmaking in Boston?

A. Twenty years.

Int 3. In the course of your business as dressmaker in Boston have you ever applied to the skirts of dresses made by you an article the same as shown in Respondents' Exhibit 10, now handed to you?

A. I have, sir.

Int. 4. Will you state how that article, the same as shown in

Respondents' Exhibit 10, was put on to the dresses made by you in Boston?

A. I put them on plain when I first began their use.

Int. 5. Please state whether or not the first dress protector made of enameled cloth, like Exhibit 10, was put on by you with a cloth attached to it.

A. It was sewed on to the facing and bound at the bottom with the dress; I have put it on with the cloth attached to the enameled cloth, as in Exhibit 10.

Int. 6. When did you cease to put on enameled cloth as a protector for the skirts of dresses?

A. I never put any on after 1868.

Int. 7. While you were so using enameled cloth, how did you put it on to the skirts of the dresses?

A. I plaited it sometimes and bound it as a protector.

Int. 8. On what part of the skirt did you put enameled cloth as a protector?

A. On the bottom, at the back and sides, and sometimes all around.

Int. 9. Will you look at Respondents' Exhibit No. 15 (now offered in evidence), and say whether or not that represents the way in which you put on plaited enameled cloth as a protector upon ladies' dresses as you have stated?

A. It does.

Int. 10. Did you, while you were using enameled cloth for skirts of dresses, put it on in any way different from that shown in Respondents' Exhibit 15; if so, how did it differ?

A. I have slashed and lapped it as in Exhibit 15, and I have bound it and turned the enameled cloth inside out to suit the colors of dresses.

Int. 11. Have you put enameled cloth on ladies' dresses since 1868?

A. I have not.

Int. 12. Please look at Respondents' Exhibit 16 [now offered in evidence] and say whether or not that represents one of the ways in which you have applied enameled cloth to the skirts of ladies' dresses as a protector.

A. I have, sir, put them on in that way.

Int. 13. You say that you have slashed and lapped enameled cloth for dress protectors; do you mean, or not, that you slashed protectors the same as Exhibit 10?

A. I have; I mean by slashing, cutting them down straight and lapping them.

CROSS-EXAMINATION by George E. Betton, Esq.:

Cross-Int. 14. Where did you buy articles like Exhibit 10 with cambric attached?

A. In Winter street usually, at Churchill & Watson's old stand.

Cross-Int. 15. When did you first put them on?

A. I can't remember.

Cross-Int. 16. Can you tell on whose dresses you put them?

A. There's but one person that I can recollect; that was Mrs. Priest, who then lived at the corner of Walnut and Chestnut streets; she is not living.

Cross-Int. 17. Have you any books of account?

A. None before 1868. That was between 1868 and 1850; I cannot remember dates.

Cross-Int. 18. Have you been in business for yourself all this time; if not, for whom?

A. For myself.

Cross-Int. 19. Can you tell what year you put it on to Mrs. Priest's dress?

A. I could not.

Cross-Int. 20. How would such an enameled cloth protector, arranged, as you say, in plaits like Exbibit 16, wear?

A. I don't know how it wore; it would wear the same as the bottom of a dress.

Cross Int. 21. Of what color was the dress of Mrs. Priest on which you applied a protector like Exhibit 16?

A. Black, I think.

Cross-Int. 22. And of what color was the protector?

A. Black.

Cross-Int. 23. The protector and dress being black, and the foundation of the enameled cloth being white, did not the edges of the plaits wear out and produce a bad appearance?

A. It wasn't on long enough to wear out.

Cross-Int. 24. Was the skirt of this dress trimmed?

A. It was not.

Cross-Int. 25. How long was this protector on Mrs. Priest's dress?

A. I do not recollect; not long.

Cross-Int. 26. Would not the weight of a protector like Exhibit 16 cause an untrimmed skirt to hang badly?

A. We didn't like it very well.

Cross-Int. 27. Why did you slash and lap a protector in the manner shown in Exhibit 15?

A. To fit the bottom gores.

Cross-Int. 28. Could it not be more easily made to fit by laying plaits.

A. That material was rather clumsy to make plaits where they could be avoided.

Cross-Int. 29. Would it not be too clumsy to make perpendicular seams?

A. I don't know as I understood you; a straight seam.

Cross-Int. 30. If you slashed and lapped it, it must have been straight up and down, must it not?

A. I suppose so.

Cross-Int. 31. And did you not find some inconvenience in sewing clumsy cloth like this?

A. I did.

Cross-Int. 32. Was this dress of Mrs. Priest's for summer or winter wear?

A. It was of woollen material and could be worn either.

Cross-Int. 33. At what season of the year did you make it?

A. I couldn't tell.

Cross-Int 34. Did you put on any protectors like Exhibits 16 and 15, in 1867?

A. No.

Cross-Int. 35. Did you put on any in 1866?

A. I don't recollect; I didn't put any on after 1868; I never had any at my rooms after that.

Cross-Int. 36. You say the dress made like Exhibit 16 was not trimmed; would not the dress then turn up and show the white of the enameled cloth?

A. There was some trouble about that.

Cross-Int. 37. Where have you kept in business in Boston before you kept at the corner of Essex and Washington streets?

A. In Winter street, at 31, when I first went there, and afterwards changed to 43.

Cross-Int. 38. What year did you go to 31 Winter street?

A. It was in 1859.

Cross-Int. 39. Did you put on any protectors like these Exhibits 15 or 16 in 1868?

A. No, sir.

Cross-Int. 40. Can you tell any year that you put any protectors on like any of these Exhibits 10, 15 or 16?

A. I cannot.

DIRECT-EXAMINATION resumed:

Int. 41. In your answer to cross 17 you say that you have no books before 1868, "that was between 1868 and 1850?"

A. I used this between those dates; that is, I used these protectors between those dates, all three kinds.

Int. 42. Did you put on to dresses protectors plaited like Exhibits 15 and 16, except Mrs. Priest's dress?

(Objected to as being re-examination, and should have been put in on chief.)

A. I did.

Int. 43. On to how many?

(Objected to as above.)

A. I can state a dozen.

Int. 44 You say in answer to cross 28, "That material was rather clumsy to make plaits where they could be avoided;" what material do you refer to, and how was it clumsy to make plaits of?

A. The protector—the enameled cloth; I suppose the enamelling made it clumsy; it made a break in the skirt when it was untrimmed.

Int. 45. What do you mean by "break?"

A. I mean that the dress would break; not that the material would break, but that the under stuff was so stiff that it would break and turn up so as to show the white side of the lining.

Int. 46. In your answer to cross 34 and 35, you say that you didn't put on any protectors after 1868; and that you never had any at your rooms after that; please explain to what protectors you referred in these answers?

A. To these 15 and 16; this enameled protector.

Int. 47. You have said that you didn't like the protector like Exhibit 16 very well; what was the objection to it?

A. It made a bend or break in the skirt, and caused it to turn and show the light side of the enameled cloth; and if it was tacked it showed the tacking through, and if the dress was trimmed with fluting it made a bend in the fluting at the top of the enameled protector.

Int. 48. Please explain, by reference to Exhibit 16, where the bend of which you speak would be?

A. It would be at the top of the enameled cloth.

Int. 49. And where would the break or bend show on the dress?

A. On the outside, at the top of the enameled cloth, and in the fluting of the fluted trimming of the dress.

CROSS-EXAMINATION resumed:

Cross Int. 50. I understood you to say that Mrs. Priest's dress was not trimmed, and therefore the bottom of her dress would turn up more for that reason, would it not, and show the white inside of the enameled cloth?

A. It would.

Cross-Int. 51. Now, madame, will you state under oath that Mrs. Priest, a lady residing in Boston, would wear, and did wear, such a protector as you have described, on her dress?

A. She did not wear it long.

Cross-Int. 52. How long did she wear it?

A. I do not recollect.

Cross-Int. 53. And yet you say you put protectors like 16 on to twelve dresses, do you?

A. I did, like 15 and 16.

DIRECT-EXAMINATION resumed:

Int. 54. Were they worn by the ladies upon whose dresses you put them, besides Mrs. Priest?

A. Generally; I believe they were.

CROSS-EXAMINATION resumed:

Cross-Int. 55. How long did they wear them?

A. I couldn't say.

N. H. TRAFTON.

BOSTON, April 30, 1875.

Counsel for defendants offer in evidence Letters Patent No. 45,840, granted to James A. Mackee January 10, 1865, for improvement in dress facing.

It is agreed that all objection to the examination of witnesses not named in the answer herein is waived by the counsel for complainant.

Attest: N. AUSTIN PARKS,
Special Examiner.

THE UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office, of the Letters Patent granted J. A. Mackee, dated January 10, 1865, No. 45,840, for improvement in dress facing.

In testimony whereof I, Ellis Spear, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this thirteenth day of May in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

ELLIS SPEAR, [SEAL.]
Acting Commissioner.

THE UNITED STATES OF AMERICA.

To all to whom these Letters Patent shall come:

Whereas James A. Mackee, of Boston, Mass., has alleged that he has invented a new and useful improvement in dress facing, which he states has not been known or used before his application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose; these are therefore to grant, according to law, to the said James A. Mackee, his heirs, administrators or assigns, for the term of seventeen years from the tenth day of January, one thousand eight hundred and sixty-five, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said improvement, a description whereof is given in the words of the said James A. Mackee, in the schedule hereunto annexed, and is made part of these presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand, at the City of Washington, this tenth day of January, in the year our Lord one thousand eight hundred and sixty-five, and of the independence of the United States of America the eighty-ninth.

J. P. USHER, [SEAL.]
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

D. P. HOLLOWAY,
Commissioner of Patents.

THE SCHEDULE REFERRED TO IN THESE LETTERS PATENT AND MAKING PART OF THE SAME.

To all persons to whom these presents shall come:

Be it known that I, James A. Mackee, a resident of Boston, in the County of Suffolk and State of Massachusetts, have invented a new and useful dress facing, and I do hereby declare the same to be fully described in the following specification, and represented in the accompanying drawings, of which—

Figure 1 is a side view of such facing.

Figure 2 denotes its application to the lower part of a dress.

Figure 3 is a transverse section of fig. 2.

Prior to my invention it has been customary to face the bottom of a dress with a band of leather or enamelled cloth or like material, having a waterproof glazing or surface; owing to variations of temperature and other atmospheric changes, the band, particularly at its upper edge, would become either elongated or contracted at times, more than at others, and so as to pucker the dress and cause it to have a bad appearance where stitched to the band. Furthermore, owing to its stiffness it becomes difficult to attach it, at its upper edge, to the dress, without causing the dress to hang badly in its folds or be liable to become worn and defaced along the stitching or seam.

In order to obviate these difficulties I have combined with the glazed waterproof facing, a thin, flexible cloth band, or glazed linen facing the two being connected together by laying one flatwise on the other with the edge of one directly over that of the other, or about so, and stitching or sewing the two together, and afterward unfolding the two.

In the drawings *a* denotes the waterproof facing, and *b* the thin linen facing, A being a portion of the lower part of the dress.

In applying the combination facing to a dress, the lower edge of the waterproof band is to be sewed to the bottom edge of the dress, and is to be protected by a band of braid *c*, stitched to the dress and the waterproof facing. The flexible linen facing at or near its upper edge is to be stitched to the dress, the line of stitching being shown at *d*.

The combination band facing not only makes a better finish to the dress, but can be applied to much better advantage, and will operate much better than the single band of waterproof material.

I claim the new manufacture or combination dress facing as composed of the waterproof or enamelled-cloth band, and the flexible linen band, or its equivalent, arranged and connected together in manner and to be used substantially as specified.

JAMES A. MACKEE.

Witnesses,
R. H. EDDY,
F. P. HALE, Jr.

EVIDENCE FOR COMPLAINANT IN REPLY.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES IN EQUITY, AS AMENDED.

BEFORE ME,
JOSEPH F. CLARK,
Special Examiner.

BOSTON, May 31, 1875.

Present—GEORGE E. BETTON, Esq., of Counsel for Complainant.
JABEZ S. HOLMES, Esq., of Counsel for Defendants.

DEPOSITION OF JAMES W. BROWN.

DIRECT-EXAMINATION by George E. Betton, Esq., for Complainant:

Int. 1. Please state your name, age, residence and occupation.

A. James W. Brown; fifty-four years; Boston; hoisery and small wares.

Int. 2. Please state how long you have been in such business, and with whom.

A. Twenty-five years in Boston; with Morse & Coleman, from 1853 to 1856; Plympton Stevenson, 1856, to July, 1859, and Lombard & Brown, two years following; Burr Brothers from February 1, 1862, to January 1, 1867.

Int. 3. While at Burr Brothers, did they sell articles for skirt facings, to your knowledge?

A. They did.

Int. 4. Please look at Complainants' Exhibits 8 and 9 and state if you remember those articles as being sold for skirt facings, and if so, in what year?

A. Don't recognize 8 as being sold at Burr Brothers during the period I was there; probably was in the market in 1866; I should think as early as that.

Int. 5. Please state for what purpose Exhibit 8 was used, and if it was bound like that exhibit with cambric.

A. Used for dress facing; I don't recognize any difference between the article used and this exhibit, as far as my memory goes.

Int. 6. Please look at Complainants' Exhibit 9, and state if you remember when that was used first, and for what purpose.

A. Used for dress facing, and was first manufactured and sold by Burr Brothers; that is, they had the exclusive sale of it at the time, either the last of 1865 or the first of 1866; I mean the sale commenced at that time.

Int. 7. Please look at Respondents' Exhibit 7, and state whether or not any such article was sold or kept for sale by Burr Brothers in Boston, while you were there.

A. I think there was not.

Int. 8. Please state whether or not Burr Brothers dealt in enamelled cloths while you were with them for dress facings, and if so, when for the first time?

A. They did not.

Int. 9. Please look at Complainants' Exhibit 5. and state whether, as you understand it, that part marked facing is the facing, and that part marked Macdonald's patent is the protector.

A. I think there is no doubt it is marked, and is a correct description (there is no mark protector).

Int. 10. I meant to ask you in the former question if the part marked Macdonald's Patent, September 29, 1874, is the protector, as you understand it.

A. It is.

Int. 11. Please state, if you know, when protectors, I mean as distinguished from dress facings, first came into the market; if, yea, what was that protector composed of, and how was it made; whether plaited or fluted or how otherwise, and in that connection please look at Complainants' Exhibit 10.

A. I should say the last of 1871, or the first of 1872. It was made of wiggan, and I should say, as near as I can remember, like this Exhibit—substantially the same.

Int. 12. You have stated that enamelled cloth was not used while you were at Burr Brothers as facings; were they used for protectors while you were there?

A. I think I stated that they were not sold by Burr Brothers while I was there, neither as facings or protectors.

CROSS-EXAMINATION by Jabez S. Holmes, Esq., of Counsel for Defendants:

Cross-Int. 1. Do you mean to say positively that Burr Brothers, as early as 1862, did not sell strips or rolls of enamelled cloth either the same or of greater width than Respondents' Exhibit 7?

A. I do, not to my knowledge.

Cross-Int. 2. Do you mean to say positively that Burr Brothers did not sell enamelled cloth in any form as early as 1862?

A. I was very familiar with all the stock in all the departments, and have no remembrance of any such article in the stock. The only article I remember as being sold for dress facing is in Complainant's Exhibit 9.

Cross-Int. 3. What department of the business of Burr Brothers was in your special charge while you were with them?

A. Hosiery, threads, yarns, skirts, hoop-skirts and other kinds; I don't remember what; I bought the skirts myself. I don't mean skirts for ladies' dresses.

Cross-Int. 4. What was the business of Burr Brothers while you were with them; I mean in what did they deal?

A. Velvet ribbons, hosiery, threads, yarns, trimmings and small wares and zephyr wool; small wares means braids, buttons, and at the present time, dress protectors, shoe strings, &c.

Cross-Int. 5. Were you the buyer of any other goods except skirts, while you were with Burr Brothers; if so, what goods?

A. Hosiery, threads, yarns, gloves and many other goods; I don't remember what.

Cross-Int. 6. Were you the sole buyer for the house of the goods which you have named?

A. I was not of all of them.

Cross-Int. 7. Were you a partner of that house?

A. No, sir; I never was a partner. I was buyer, and what was called manager of the hosiery department.

Cross-Int. 8. What business have you been in since you left Burr Brothers, and in what capacity?

A. I was with B. F. Dutton one year—year of 1867; same business as Burr Brothers, as a buyer in hosiery and glove department; after that, was in business for myself four years, same business; then with Burr, Taft & Co., two years as salesman only—general salesman—and then one and one-half years with Brown, Durrell & Co., as buyer and salesman; buyer of hosiery and gloves; their business was same as the others.

DIRECT-EXAMINATION resumed:

Int. 13. You have been asked if articles like Exhibit 9 were sold for facings while you were at Burr Brothers; was any such thing sold for protectors or anything like it?

A. Not what I understand by protector now. Protector is a drag.

CROSS-EXAMINATION resumed:

Cross-Int. 9. If a long dress were made faced all around the bottom of the skirt, as in Complainant's Exhibit 5, but without the part labelled in that Exhibit Macdonald Patent, September 29, 1874, would that, in your opinion, protect the dragging skirt?

A. I think it would.

Cross-Int. 10. If a long dragging skirt was made as in last question, except that the part marked facing in Complainant's Exhibit 5 were made of waterproof material, would that, in your opinion, protect the skirt from wet as well as dirt?

A. It would somewhat. I mean it wouldn't be as good a protector as if plaited or folded.

Cross-Int. 11. Why not?

A. It would bring the cloth or dress more directly in contact with the dirt or wet. Wouldn't lift it so much from the sidewalk.

Cross-Int. 12. I think you have not understood my question. Suppose in Exhibit 5 the part marked Macdonald Patent were taken off, and the part marked facing were applied exactly as in that exhibit, but made of waterproof material, bound to the skirt of the dress by a braid, would that, in your opinion, protect the skirt from wet as well as dirt, and prevent the skirt from wearing out?

A. It would be a protection—a partial protection—against wet and dirt both.

Cross-Int. 13. What do you mean by a partial protection?

A. I don't believe that it would be an absolute protection. I don't believe any of these things would be an absolute protection. I mean the variety of goods that are offered for protectors.

DIRECT-EXAMINATION resumed:

Int. 14. Please state if, in the case proposed in the last two or three questions by the respondents, the skirt was faced as those questions supposed, and bound with a braid like Complainant's Exhibit 5, would it not be necessary that a protector, to serve as a protection, should come between that braid and the sidewalk to protect that braid from wet and dirt, or in other words, should not such waterproof protector in such case extend below the braid to protect it and the dress from water and dirt?

A. One that extended below the braid would be much better protection in my judgment; much better than one that did not extend below the braid.

JAMES W. BROWN.

Attest:

JOSEPH F. CLARK,
Special Examiner.

DEPOSITION OF JOHN NORTON.

DIRECT-EXAMINATION by H. M. Macdonald, complainant.

JUNE 4, 1875.

Int. 1. What is your name, age, residence and occupation?

A. John Norton; forty-two years; residence, Boston, Mass.; occupation, laborer.

Int. 2. Have you been employed by the firm of Turnbull & Co., afterwards known as Churchill & Watson, and now as Churchill, Gilchrist & Smith?

A. I have not been employed by Gilchrist & Smith.

Int. 3. Were you employed by that firm when known as Churchill & Watson?

A. Yes.

Int. 4, What kind of work did you do while employed by that firm?

A. That is pretty hard to tell; my principal business was porter.

Int. 5. That means you carried out bundles and drove a team, does it?

A. Yes; and did packing in the store.

Int. 6. Will you please look at Complainant's Exhibit Nos. 8 and 11, and state whether or not, while you were in the employ of Churchill & Watson, you saw any such goods in the store, either being manufactured or for sale?

A. I have.

Int. 7. Were those goods cut up in the store, and carried out by you to be stitched?

A. They were.

Int. 8. In what year do you think they commenced to cut these goods, and you began to carry them out to be stitched?

A. In 1862.

Int. 9. Were they called dress facings or dress protectors?

A. They were called dress facings; Exhibit 11 was in 1862; Exhibit 8 was later.

Int. 10. Did the firm of Churchill & Watson manufacture these goods in large quantities?

A. They did.

Int. 11. Will you look at Respondent's Exhibit 10, and state whether or not the same firm manufactured goods like that?

A. They were manufactured for them by another party, and carried to the store to be sold there. We used to call this article Mackee's patent.

Int. 12. Do you remember anything about this enamelled cloth when first manufactured by Mackee; as to quality, was it light or heavy?

A. It was pretty heavy. I suggested to myself when I saw it manufactured that it was pretty heavy material for the bottom of a dress.

Int. 13. Will you please look at Respondents' Exhibit 7, and say if it was very much heavier than that? I mean the goods that were manufactured for dress facings, and known as Mackee's combination facing?

A. It was heavier. I do not recollect seeing any material manufactured there so light as this.

JOHN NORTON.

Attest:

JOSEPH F. CLARK,
Special Examiner.

DEPOSITION OF CHARLES T. E. CLAPP.

JUNE 4, 1875.

DIRECT-EXAMINATION by George E. Betton, Esq., of Counsel for Complainant:

Int. 1. What is your name, age, residence and occupation?

A. Charles T. E. Clapp; age, 34 years; reside Boston, Mass.; occupation, clerk,

Int. 2. Please state in whose employ and in what business you have been engaged in, and how long in such business?

A. Employed by N. D. Whitney & Co., ladies' furnishing goods; commenced in 1865, left in 1872, and went back in 1874.

Int. 3. Please state if your employment embraced the sale or purchase of dress facings and protectors.

A. It did.

Int. 4. Please state what experience and how long you have had, or rather what knowledge you have, and from what sources as to the application of facings and protectors to the skirts of dresses?

A. Ever since I have been in the business it has been my part to sell these goods.

Int. 5. Question is, do you know how they are applied to dresses?

A. I do.

Int. 6. Please look at Complainant's Exhibit 14, and state what you call that piece of enamelled cloth on the bottom of the skirt bound in with braid?

A. I call it facing.

Int. 7. Does or is an article called facing, as you have described in the previous question and answer, intended to go all around the bottom of the skirt, as it appears in Complainant's Exhibit 14?

A. Facings are intended to go all around the dress.

Int. 8. Please state if you mean that the facing which you have spoken of, and shown in Exhibit 14, is intended to go all around the bottom of the skirts of dresses.

A. It goes all around the bottom of skirts of dresses.

Int. 9. Please look at Complainant's Exhibit 13, and state what you call that piece of enamelled cloth on the back or trail of the dress?

A. A dress protector. I mean for the bottom of the skirt.

Int. 10. Please state whether or not a protector must be so attached to the trail of the dress as to come between the bottom of the skirt to which the braid is attached and the sidewalk?

A. The protector is to be attached to the bottom of the skirt so as to extend below the braid, between it and the sidewalk.

Int. 11. State whether or not protectors are sewed on over the facing after the dress is finished, as seen in Complainant's Exhibit 13?

A. Protectors are sewed on over the facing after the dress is finished.

Int. 12. Please look at Complainant's Exhibits 8 and 9, and state whether or not you remember these articles were sold by you, and during what years, and what they were sold for?

A. This No. 9 was sold by me from 1866 up to 1870 or 1871, as a facing. No. 8 was sold about the year 1866 to 1872, as a facing.

Int. 13. Will you please look at Complainant's Exhibit 15, and state whether or not that is a skirt protector, or a skirt facing?

(Objected to as incompetent.)

A. I should say most emphatically it is a skirt protector.

Int. 14. You will see on the edge of this Exhibit 15 a band of corrugated rubber, or rubber cloth; if this rubber band or a similar one were sewed under the braid or lower edge of a walking-dress of the present fashion, would it be a protection to the braid or lower edge of said dress?

A. If it was sewed so as to extend below the braid it would protect the dress.

Int. 15. Supposing that the piece of corrugated rubber, part of Exhibit 15, was put on the trail of a skirt not to extend be-

low the braid on the bottom of the skirt, would it then be any protection to the braid or bottom of the skirt?

A. It would not.

Int. 16. Please state whether or not you would sell such a piece of corrugated rubber as attached to Exhibit 15 (but separated from it), for a skirt facing.

(Objected to for form, and as incompetent.)

A. No.

Int. 17. Please state if a piece of hair-cloth like Complainant's Exhibit 8, or a piece of moreen like Complainant's Exhibit 16, were fluted or plaited and attached to the bottom of a skirt, or lower edge of a skirt, to extend below the lower edge like the enameled cloth protector on Complainant's Exhibit 13, would such hair-cloth or moreeen protector operate to protect the bottom or lower edge of the skirt from getting wet?

A. It would not.

CROSS-EXAMINATION by Jabez S. Holmes, Esq., of counsel for defendants:

Cross-Int. 1. Supposing an article the same as Respondents' Exhibit 10 were applied all around the bottom of the skirt of a dress, with the edge of the enameled cloth or waterproof material even with the bottom of the skirt, would that, in your opinion, be a protector or facing?

A. Would be a facing.

Cross-Int. 2. And not a protector in your opinion?

A. Not a protector.

Cross-Int. 3. Why not?

A. Because it does not extend below the bottom of the dress to protect it from the sidewalk.

Cross-Int. 4. Then, if I understand you, the waterproof material attached to the bottom of the skirt, must, in your opinion, extend below the bottom of the skirt in order to be a protector; am I right?

A. Yes; because it comes to no wear unless it does.

Cross-Int. 5. Suppose a waterproof material, fluted or plaited attached to a dress, as described in the first cross-interrogatory, and all around the bottom of the skirt of that dress, would that, in your opinion, be a protector or a facing, or both?

A. Facing and not a protector.

Cross-Int. 6. Will you look at Complainant's Exhibit 13, and state what you consider to be the facing, and what to be the protector on that exhibit?

A. The part extending all around (the cambric), from the bottom of the dress upward, is the facing. This piece of enameled cloth attached to the rear part of the dress, extending below the bottom of the skirt, is the protector.

Cross-Int. 7. Suppose the piece of enameled cloth attached to the bottom of the dress, as in Complainant's Exhibit 13, came down even with the bottom of the edge of this skirt; would that, in your opinion, be a protector of the skirt of that dress?

A. I should consider it a useless incumbrance, either as a facing or protector.

Cross-Int. 8. Supposing Complainant's Exhibit 3 were attached to the skirt of a dress so that the bottom of the india rubber fluting or plaiting came just even with the bottom of the skirt of the dress, but did not come below it; would that, in your opinion, be a protector for the dress?

A. I consider no material, whether waterproof or not, in any shape or form, whether fluted, plaited or plain, a protector unless it projects below the bottom of the dress.

Cross-Int. 9. Then Complainant's Exhibit 3 applied to the skirt of a dress, as stated in last question, would not, in your opinion, be a skirt protector?

A. I consider this a protector to project below dress as much as any protector; I mean Complainant's Exhibit 3. It would not.

Cross-Int. 10. Will you look at Respondents' Exhibit 9, and say whether or not that enameled cloth, in your opinion, would be a protector to the skirt of a dress if applied to the skirt so as bring the bottom of the enameled cloth even with the bottom of the skirt as shown in that exhibit?

A. I consider it is a facing; I mean the whole thing, cambric and enameled cloth, and no part of it a protector.

Cross-Int. 11. Supposing the bottom of the enameled cloth in Complainant's Exhibit 9 projected a half inch below the bottom of the skirt; would that, in your opinion, be a protector?

A. If enameled cloth extended a half or one-fourth of an inch below the skirt, whether fluted or plaited or plain, it would, in my opinion, be a protector. I consider Complainant's Exhibit 3 a protector when put on with a fluting extending below the dress.

DIRECT-EXAMINATION resumed.

Int. 18. Please look at Respondents' Exhibit 11, and state whether or not, in your opinion, the enameled cloth thereto attached would operate as a protector to the plaited braid on that exhibit?

A. No, sir; no protector at all to it.

CROSS-EXAMINATION resumed.

Cross-Int. 12. Would this enameled-cloth in Exhibit 11, operate as a protector to the bottom of the skirt of a dress, supposing there were no plaited braid on the bottom of the skirt?

A. No, sir.

Cross-Int. 13. Why not?

A. Because it does not come to wear, and does not touch anything; I mean on a trail dress; that is a dress that touches behind; Complainant's Exhibit 13 shows what I mean by a trail.

DIRECT-EXAMINATION resumed.

Int. 18. Please state, if you know, when skirt protectors first came into use, and in that connection please look at Complainant's

Exhibit 10, and state, if you know, when that came in, and what, if anything, followed it.

A. Skirt protectors first came in in the year 1872; spring, I think; I think this Exhibit 10 was the first that came in, sometime in the spring of 1872. I don't remember of anything of any of these protectors except enameled protectors that followed it.

Int. 19. Do you mean enameled, or rubber-cloth protectors?

A. I think there wasn't a great deal of difference at the time they came in.

CHARLES T. E. CLAPP.

Attest:
JOSEPH F. CLARK,
Special Examiner.

DEPOSITION OF HENRY T. CHAMPNEY.

JUNE 4, 1875.

DIRECT-EXAMINATION by George E. Betton, Esq., of Counsel for Complainant.

Int. 1. Please state your name, age, residence and occupation.

A. Henry T. Champney; forty-nine years; Medford; merchant.

Int. 2. Please state in what business you have been engaged in Boston, and how long you have been in that business.

A. General sale of upholstery goods; 23 years.

Int. 3. Please state whether or not said business includes the use of enameled cloth.

A It does.

Int. 4. Of whom did you usually obtain your enameled cloths?

A. Principally of the Crocketts, of Newark.

Int. 5. Please look at Respondents' Exhibit 7, and state whether or not, as a dealer in enamelled cloths, any such cloth as Exhibit 7 was in the market as early as 1861, or 1862, or 1863, or when, for the first time, did enameled cloth of that substance, to your knowledge, come into the market?

A. They were not in the market before 1864 or 1865 of this grade, or of a grade corresponding to Exhibit 7?

Int. 6. Please state if such a grade of enameled cloth, like Exhibit 7, was in request for any and for what purpose, and whether it could be obtained before 1868?

A. It was called for repeatedly; stated to be by parties who called for it for the facings of dresses. I never saw any of it before that time, although I repeatedly tried to have them manufacture it.

Int. 7. Please look at the piece of enameled cloth now handed to you by complainant, and marked Complainant's Exhibit 17, and state whether or not that was the grade of enameled cloth used and in the market prior to 1865; and in that connection please to explain how you compare Respondents' Exhibit 7 with

Complainant's Exhibit 17, and state the difference in the grades; whether you distinguish them by weight or by the quality of the cloth?

A. I have sold these goods for myself and others for sixteen years prior to 1861; the goods of Exhibit 17 is much heavier than that of Exhibit 7; the difference is in the weight of cloth as well as in the material put on that cloth—the composition.

Int. 8. I intended to ask whether or not Complainant's Exhibit 17 was the grade of cloth in the market up to 1865?

A. It is.

Int. 9. Do you remember endeavoring to get the desired grade of cloth like Exhibit 7 of other persons beside the Crocketts, of Newark, between 1861 and 1865?

A. Yes; the Taunton Enamel Cloth Company and G. W. Gorham, of Newark, N. J., and one or two others whose names I do not remember.

Int. 10. And were you able to obtain any such grade of cloth as Respondents' Exhibit 7 of any of those persons during that time?

A. I was not; their excuse was, that they were running their factory on other goods that paid better.

CROSS-EXAMINATION by Jabez S. Holmes, Esq., Counsel for Defendants:

Cross-Int. 11. Do you know whether or not enameled cloth of the thickness of Respondents' Exhibit 7 was ever sold prior to 1870?

A. Yes; it was sold for three or four years prior to 1870.

Cross-Int. 12. Do you know whether it was sold more than four years prior to 1870?

A. They were sold to my knowledge in 1865 for the first time.

Cross-Int. 13. Do you know whether it was sold before 1865?

A. Not to my knowledge; as I dealt in all grades of them I should have known it, it seems to me.

Cross-Int. 14. How long have you sold enameled cloth; in what year did you begin?

A. Twenty-five years for myself and others; 1849.

Cross-Int. 15. Since 1849 has enameled cloth been generally on sale in the market?

A. Very extensively sold and used both in this country and in Europe, in large cities; in fact, everywhere.

Cross-Int. 16. And the only change in the cloth, as I understand, has been in the grade or thickness; am I right?

A. The first that was made was more crude in every particular; it has been modified and improved in various ways since the first introduction; the thick grade was made first; there was no change in the grade till after 1864.

Cross-Int. 17. How early was enameled cloth like Complainant's Exhibit 17 first made, if you know?

A. That was the original cloth, except the modification I spoke of in my last answer.

Cross-Int. 18. How early was enameled cloth same as Respondents' Exhibit 7 made, if you know?

A. 1865 was the earliest I knew of it.

Cross-Int. 19. For what purpose has this enameled cloth been used?

A. Principally for furniture.

Cross- Int. 20. Has it always been made of different colors?

A. From the first.

Cross-Int. 21. Has it always been made with a white or gray back?

A. No; it has been made with various colored backs, fancy backs, depending upon the purpose for which it was to be used.

Cross Int. 22. Has it sometimes been made and sold with the back of the same or nearly the same color as the enameled face?

A. No; usually contrasted with some different color; where it was used and both sides to be seen, as for curtains of carriages; it was then colored some color to suit the fancy of the party, but never of the same color as the face of it.

Cross-Int. 23. Did you ever sell any enameled cloth with a black or nearly black back?

A. No.

Cross Int. 24. In what form have you sold enameled cloth?

A. In uniform rolls of twelve yards in length, and from thirty-six to seventy inches wide.

Cross-Int. 25. Have you ever sold it at retail?

A. No; only to the trade and jobbers.

Cross-Int. 26. Do you know for what purpose it has been sold by the jobbers?

A. Principally for furniture, for which it was originally designed, and for cheap carriages, extensively.

Cross-Int. 27. Do you know whether or not it has ever been sold in strips from two to six inches wide by retailers or jobbers?

A. I have seen it exposed for sale in those widths in 1863 and 1864.

Cross-Int. 28. Do you know whether or not it was sold in that form before 1863?

A. The sale was attempted; but owing to the thickness and weight of the goods, it wasn't a success at first; it proved too heavy for the purpose they wished to adapt it to; it afterward became a success, owing to their getting a lighter material.

Cross-Int. 29. Was it not largely sold in that form before 1863?

A. Not to my knowledge; I had a great many inquiries, about 1863, for an article lighter than the one then in the market.

Cross-Int. 30. By whom were the inquiries made?

A. By outside people who were evidently in the manufacture of goods for ladies' wear; I occupied at that time half of Champney Brothers' store, who were largely engaged in the sale of small wares and ladies' trimmings; and such inquiries were naturally directed to me as a dealer in the article.

Cross-Int. 31. Did the Champney Brothers have enameled cloth for sale?

A. No; they bought some of these heavy goods of me, and undertook to make them up, and afterwards threw away stacks of them as being unsuitable and unsalable.

Cross-Int. 32. What do you mean by making them up?

A. Cutting in strips to be sold for facings for ladies' dresses.

Cross-Int. 33. And this was when?

A. In the early part of 1863 and the last of 1862.

HENRY T. CHAMPNEY.

Attest:

JOSEPH F. CLARK,
Special Examiner.

DEPOSITION OF HARRIET J. CHENEY.

JUNE 9, 1875.

DIRECT-EXAMINATION by George E. Betton, Esq.:

Int. 1. Please state your name, age, residence and occupation?

A. Harriet J. Cheney; thirty-three years old; reside in Boston; clerk, 45 Winter street, for H. E. Davis & Co.

Int. 2. Please state how long you have been in business and with whom?

A. Since April, 1867; M. M. Lethbridge, at 56 Winter street, Boston; was there until July, 1868; with F. W. Cobb, No. 20 Winter street, from July, 1868, until May, 1872; from May, 1872, until April; 1875, George B. Davis, No. 281 Washington street; now at H. E. Davis', 45 Winter street.

Int. 3. Please state whether or not articles like Respondents' Exhibit 10, now handed you were sold at any of your places of business; if so, at which place, and for what purpose they were sold?

A. They were sold at F. W. Cobb's, No. 20 Winter street, for dress facing.

Int. 4. Please state, if you know, whose facing that was; what name it had?

A. I don't know the name; we called it the enamel-cloth facing.

Int. 5. Please state, if you know, whether or not it was the Mackee's patent?

(To this interrogatory the objections are made as incompetent.)

A. I know it was this facing.

Int. 6. Please state, if you know, when short dresses and gored skirts first came into fashion; and in that connection please look at Complainant's Exhibit 19, and state if that illustrates such short and gored dresses?

A. In the year 1865. (It does.)

Int. 7. Please state, if you know, how skirts of dresses were made prior to 1865, and between that time and going back to 1860; and in that connection please look at Complainant's Ex-

hibit 18, and state if that illustrates the method of making skirts during those years?

A. I do not know; they were made long, straight and very full; not gored. Exhibit 18 does illustrate the way of making dresses during those years.

Int. 8. Please state whether or not a piece of enamel cloth like Respondents' Exhibit 10 could be attached to the bottom of gored skirts successfully, and why not?

A. It could not; the bottom of a gored skirt is half circular, and it is impossible to put this straight facing upon it and do it nicely.

Int. 9. Please look at Complainant's Exhibit 14, and state what you call that piece of enamel cloth attached to the bottom of the skirt?

A. A dress facing.

Int. 10. Please look at Complainant's Exhibit 13, and state what you call the piece of enamel cloth attached to the skirt thereof.

A. A dress protector or skirt protector.

Int. 11. Please state whether or not it is necessary that a skirt protector, in order to serve as a protection to the lower edge of the skirt, should extend below the lower edge and come between that lower edge and the sidewalk?

A. Yes, it must.

Int. 12. Please state whether or not you have sold articles like Complainant's Exhibits 9 and 16 while in business, and for what purposes were they used?

A. I've sold like Exhibit 9; it was used for dress facings, and also Complainant's Exhibit 8, for the same purpose.

Int. 13 Please state whether or not any such article, substantially like Complainant's Exhibit 8 or 9, could be used as a protector as you have defined a protector?

A. They could not.

Int. 14. Please state when the sale of articles like Respondents' Exhibit 10 ceased, if you know, and why?

A. I sold it as late as 1868; it ceased because gored skirts became generally worn, and it was impossible to use it on them.

Int. 15. Please state when the sale of articles like Respondents' Exhibit 10 commenced, if you know?

A. I don't know.

Int. 16. Please state when the articles like Complainant's Exhibit 10 first came into use, if you know?

A. In the fall of 1872 or the spring of 1873; I cannot tell which.

Int. 17. Please look at Respondents' Exhibits 9, 11 and 13, and state whether or not the pieces of enamel cloth extending down about or nearly to the edge of the skirt would serve as a protection to the bottom of the skirt or as protectors, as you have described them in Complainant's Exhibit 13?

A. No, they would not.

CROSS-EXAMINATION by Jabez S. Holmes, Esq.:

Cross-Int. 18. You have said that a piece of enamel cloth like Respondents' Exhibit 10, could not be attached successfully to the bottom of a gored skirt, and that it would be impossible to do it nicely; will you explain fully why such a piece of enamel cloth attached to cambric, as in Exhibit 10, could not successfully be applied to the bottom of a gored skirt?

A. The bottom of a gored skirt is circular, and the facing must be cut in the same way—circular or gored; Respondents' Exhibit 10 is perfectly straight, and could not be put on a gored skirt to fit unless it could be taken up in plaits, and that would be stiff and clumsy, and would wear off, leaving the white cloth underneath the enamel.

Cross-Int. 19. How long did you suppose the article like Respondents' Exhibit 10 to be, when you answered the last question?

A. I understand it as a dress facing, and that would go all the way around the dress. The distance round the bottom of a skirt, the present fashion, is about three and one-half or four yards.

Cross-Int. 20. Would there be any difficulty in applying Complainant's Exhibit No. 3 to a gored skirt?

A. I think not.

Cross-Int. 21. Would it make any difference, in your opinion, whether Complainant's Exhibit No. 3 were applied to a gored skirt plain, as shown at the end of that exhibit, or plaited, as shown in the middle of that exhibit?

A. I think it better to have it plaited in the back; it fits the bottom of the dress better, and easier to put on unless the straight piece be cut on the bias. This dress protector would go on just as easy this way (I don't think I understood the gentleman's question).

Cross-Int. 22. Will you look at Complainant's Exhibit 3, and state whether that can be applied to a gored skirt; and if so, how?

A. It can be, easily. This exhibit is narrow, and the difference between the bottom of the skirt and the place where this is sewed on is so little, that the plaiting makes it fit to the dress sufficiently so it will go on with perfect ease.

Cross-Int. 23. Supposing Complainant's Exhibit No. 3 were made plain with no plaits; would there be any difficulty in applying it to a gored skirt; and if so, what?

(Objected to as not defining it, whether to be applied as a protector, or facing.)

A. It could be applied, but not as easily, as there would be a fullness.

Cross-Int. 24. How would that fullness be remedied?

A. There would be so little that in sewing it on you could hold it a little full, and it would make it fit.

Cross-Int. 25. Suppose a strip exactly like Respondents' Exhibit 10, but as long as Complainant's Exhibit 3, were so cut as to make the whole width of the cambric and the enamel cloth

exactly the same as in Complainant's Exhibit 3, the proportions of cambric and enamel cloth being exactly the same as in Respondents' Exhibit 10, that is, the one as wide as the other, could or could not such an article be applied to a gored dress?

A. It could be applied as a facing in any part of the dress with the same trouble there would be with a straight protector—a fullness at the top.

Cross-Int. 26. What do you mean by a straight protector; do you mean Complainant's Exhibit 3?

A. I mean a protector without any plaiting, as shown at the end of Complainant's Exhibit 3.

Cross Int. 27. Supposing a strip like Respondents' Exhibit 10, as long, and as wide, and plaited exactly the same as Complainant's Exhibit 3; could that, in your opinion, be applied to a gored skirt as easily as Complainant's Exhibit 3?

A. If made in the same way, yes.

Cross-Int. 28. Could it if made as described in the last question?

A. Yes.

Cross-Int. 29. Supposing Complainant's Exhibit 3 were made long enough to go all around a dress, and put all around a dress; should you call it a facing, protector, or both?

A. I should call it a protector if it was put on to come between the braid and sidewalk.

Cross-Int. 30. Suppose a strip like Respondents' Exhibit 10, so cut as to be of the same width as Complainant's Exhibit 3, the cambric and the enamel cloth being left of equal width, were made long enough to go all around a dress, and put all around a dress; would that be a facing, protector, or both?

A. I think it would be a dress facing.

Cross-Int. 31. Supposing such a strip as described in the last question were plaited and put all around the bottom of the skirt of a dress; would that be a facing, protector, or both?

A. This or anything else that comes between the dress-braid and the sidewalk would be a protector, whether it be fluted, plaited or plain.

Cross-Int. 32. Are you able to state, of your own knowledge, when gored skirts were first made in Boston?

A. Near as I can remember, by my own experience, the first one was in 1865 or 1866.

Cross-Int. 33. Is that all you know about it?

A. I merely know that from the facts that the exhibits here went out of sale about that time, or soon after this (1865 or 1866), and we had them in stock, but 'twas impossible to sell them.

Cross-Int. 34. Are you able to say, of your own knowledge, that gored skirts were not worn in Boston before 1865?

A. As near as I can remember that was the first date of their appearance here. I am very positive they were not. I have nothing to date from only my own memory.

DIRECT-EXAMINATION resumed:

Int. 35. Please hear your answer to the 33d interrogatory read, and state if you mean when you say that the exhibits here went out of sale after 1865 or 1866, and that you found you had them in stock, and that it was impossible to sell them, you meant Respondents' Exhibit 10?

A. Yes.

HARRIET J. CHENEY.

Attest:

JOSEPH F. CLARK,
Special Examiner.

DEPOSITION OF EDWIN R. FLYNT.

JUNE 9, 1875.

DIRECT-EXAMINATION by George E. Betton, Esq.:

Int. 1. Please state your name, age, residence and occupation?

A. Edwin R. Flynt; forty-eight years old; Newton; trader.

Int. 2. Please state what kind of business you have been in, and how long?

A. Dealer in window shades and upholstery; twenty-five years.

Int. 3. Please state whether or not that business included the purchase and sale of enameled cloths.

A. It does.

Int. 4. Please state whether or not any such grade of enamel cloth as Respondents' Exhibit 7 was in the market to your knowledge, in 1862, 1863, 1864, or when should you say it came in for the first time?

A. There was none in 1862 and 1863; later than that I don't know; in our business we had no occasion to use such thin goods, except for a particular purpose.

Int. 5. Please look at Complainant's Exhibit 17, and state whether or not that was the grade of enamel cloth in the market in those years you have mentioned.

A. This, and stouter and heavier goods; heavier goods made on duck; this is what was and is made on muslin.

Int. 6. Please state what, if any, efforts you made to get any enamel cloth lighter than Complainant's Exhibit 17 and like Respondents' Exhibit 7, and what success you had.

A. Yes, I tried hard to get some lighter than this 17; I sent to Philadelphia and Newark and New York, and tried here. I could not find it; it was not to be found; or I couldn't find it at any rate.

EDWIN R. FLYNT.

Attest:

JOSEPH F. CLARK,
Special Examiner.

Deposition of Olivia P. Flynt.

June 7, 1875.

Direct-examination by George E. Betton, Esq.:

Int. 1. Please state your name, age, residence and occupation?

A. Olivia P. Flynt; forty-nine years; Newton, Mass.; dress-maker, inventor and manufacturer.

Int. 2. I believe, madam, you have the reputation of a first-class dress-maker; name, if you please, a few of the first people for whom you have worked?

A. Mrs. Tudor, Mrs. Burgess and Mrs. Charles Homer, of Beacon street; latterly, Mrs. Dr. Codman, of Boston, and many others.

Int. 3. Please state how long you have been in the business of dressmaking?

A. Twenty years in Boston previous to June 1873, and latterly since September, 1874.

Int. 4. Please state how skirts of dresses were made in 1860, 1861, 1862, and how long they continued made in the form described, and in that connection please look at Complainant's Exhibit 18, and state if that represents the method of making skirts in those years?

A. They were made very full; we frequently put in fifteen breadths of silk. I had a dress brought to me that was made in 1864, to make over, in which there was six breadths of one and one quarter yards wide silk, and the lady was shorter than I am; out of this skirt I made a costume in 1875. July 1865, was the first intimation I had from Paris that there was to be a change in the skirts; they were to be short and gored; they were to be short nearly to the top of the boots. All of my books of fashion came from Paris written in French, not translated, so that I got them earlier than others. I should call Exhibit 18 a good illustration of the fullness of skirts in those years.

Int 5. Then if I understand you, the full skirt, as you have described, continued in fashion from 1860 till 1865 or 1866, when short dresses and gored dresses came in about the same time; am I right?

A. You are.

Int. 6. Please look at Complainant's Exhibit 19, and state if that illustrates short dresses as you have described.

A. It illustrates both short and gored.

Int. 7. Please state what sort of a protector would one of one and one-half to two and one half yards in length be on such a full-skirt dress as you have described in use in those years?

A. Insufficient.

Int. 8. Would it be any protection at all?

A. I should think not.

Int. 9. Please look at Complainant's Exhibit 14, and state what you call that piece of enameled cloth sewed on to the bottom of the skirt; whether a facing or protector?

A. Facing.

Int. 10. Please look at Complainant's Exhibit 13 and state what you call that piece of enameled cloth attached thereto; whether a facing or proctor?

A. I call it a protector.

Int. 11. Please state whether or not it is necessary that a skirt protector should come between the lower edge of the skirt and the sidewalk to serve as a skirt protector, as shown in Complainant's Exhibit 13?

A. It must come outside and below the edge of the skirt; I might have said beyond the skirt; it must come between the skirt and the sidewalk.

Int 12. Please state, madam, how I understand you to mean by coming outside of the skirt; it must be sewed on inside of the bottom of the skirt and project below, must it not?

A. It must.

Int. 13. Please state whether a piece of enameled cloth only extending down even with the lower edge of the skirt, and not sewed down as shown in Respondents' Exhibit 9, would be a protector, or what would you call it?

A. It would be no protection whatever, and the dress would turn up and it would be an unsightly object.

Int. 14. Please state whether or not, if the dress should turn up as you have described, it would expose the white back of the enameled cloth.

A. It would.

Int. 15. Did you ever see a piece of enameled cloth inked or smutted like Exhibit 9?

A. I never did. They were all white backs in the days of enameled cloths.

Int. 16. Would such a piece of enameled cloth coming down only to the lower edge of the shirt, as shown in Respondents' Exhibit 13, serve to protect the lower edge and the braid thereon from getting wet?

A. Decidedly no.

Int. 17. Supposing that the piece of enameled cloth, as shown in Respondents' Exhibit 13, was sewed down and bound in to the lower edge with a piece of braid; would it then be a protector, or a facing?

A. A facing; it would still need a protector.

Int. 18. Please state whether or not a plain piece of enameled cloth, like Respondents' Exhibit 13, could be successfully applied either as a protector or facing to a gored skirt; and in that connection, please state why not.

A. It could not, to such work as I have ever done; it would be too stiff—too clumsy; the bottom of a gored skirt representing a half circle when laid flat without plaiting, it would be impossible to apply it to such circular edge, and if you were to go a half block the enamel would be worn off leaving the white cloth. I mean that if you should attempt to plait this enamel the plaited edge would wear off.

Int. 19. Do I understand you to mean that you could not apply a plain piece of enameled cloth to the lower part of a gored

skirt, neither as a facing nor a protector, and that if you should undertake to plait such a thick piece of enameled cloth for a protector that the enamel would break off and show the white of the cloth; am I right?

A. That's my opinion.

Int. 20. Please look at Respondents' Exhibit No. 15, and state whether or not such a piece of enameled cloth could be slashed and applied in that way to the bottom of a gored skirt as a protector or a facing.

A. Not successfully; that would be called a bad job altogether.

Int. 21. Please look at Respondents' Exhibit 16, and state whether that would operate any better as to the enameled cloth so applied?

A. Certainly not.

Int. 22. Please look at Respondents' Exhibit 7, and state whether or not any such grade of enameled cloth was in the market, to your knowledge, in 1862 or 1863, or when for the first time, to your knowledge?

A, I am positive not in 1862 or 1863; I have no knowledge when. If there was any at that time I could not find it, for I searched vigilantly.

Int. 23. Please state for what purpose you sought vigilantly for such grade of enameled cloth; I mean what did you propose to do with it?

A. For use for garments for horseback riding for ladies.

Int. 24. I mean where was it to be placed on the skirt; whether or not at the bottom, for facings, or how otherwise?

A. (It was), on the bottom of ladies' pants, same as gentlemen's.

Int. 25. Please state whether or not you desired to find such grade of enameled cloth like Respondents' Exhibit 7, for facings for the lower part of the skirts of street dresses.

A. I have; but in a different color.

Int. 26. Please look at Complainant's Exhibit 17, and state whether or not that was the grade of enameled cloth in the market from 1861 up to what time, and for what purpose that was used on ladies' dresses, if at all.

A. I saw no other while in business. I have seen it used as a facing.

Int. 27. Please state whether or not you saw such grade of cloth as Complainant's Exhibit 17 used on the bottom of skirts of dresses as a facing in 1862 or 1863 for the first time.

A. (I think in 1863.) One of Mr. William Clapp's clerks sent it round to me to see if I could use it for skirt facings.

Int. 28. And that, if I understand you correctly, was about the first that you saw it used for that purpose; am I right; and how did it work for that purpose?

A. The very same day when this was sent to me on approbation a lady wore one on her dress, and it rattled like a mess of beans on the floor.

Int. 29. Did you then try it yourself for facings; if so, how did it work?

A. I did not.

Int. 30. Please state when, for the first time, you used a piece of enameled cloth with a piece of cambric attached, like Complainant's Exhibit 20, to your recollection, and for what purpose.

A. Perhaps in 1863, for facings.

Int. 31. Please state whether or not all dresses are finished with a facing at the bottom of the skirt?

A. With a facing, hem or binding.

Int. 32. Are dresses ever finished simply with a lining?

A. It would be impossible; it must have a cord, binding, facing or hem.

Int. 33. Supposing a gored dress were lined simply from the top of the skirt to the bottom; such lining would be sewed in with the seams of the gores, would they not, and in such case would not a facing be required to hide the raw seams?

A. The seams of the dress and lining may be sewed altogether so as to leave those seams finished as neatly inside as out; but the bottom of the skirt would still be unfinished, requiring a cord, braid or facing.

Int. 34. Please state whether or not a stiffening is required at the bottom of the skirts of street dresses?

A. That is all a matter of fashion or taste—individual taste.

Int. 35. You have stated that gored skirts and short skirts came to your knowledge in 1865 for the first time; how long were they worn short, as you described, and gored?

A. They were worn gored up to the present time, and short up to the fall of 1872.

Int. 36. You have stated, if I understand it correctly, that the piece of enameled cloth attached to the lower part of the skirt, as shown in Complainant's Exhibit 13, and coming below the lower edge of the skirt, would be a protector; am I right?

A. You are.

Int. 37. Now, I ask, would there be any use for such a protector to be applied, as in Complainant's Exhibit 13, on short dresses which, you say, came in in 1865, and continued up to about 1872?

A. No.

Int. 38. Please look at Complainant's Exhibit 16, and state what that is called, and how it is used, if you used it; I mean for what purpose, and how long it was used by you?

A. It is called moreen: it was used as a stiffener and facing; by me used a very few times.

Int. 39. Please state whether to your knowledge hair-cloth could be used, or was used, as a facing or stiffening, and whether such hair-cloth could be used as a protector, as you have described a protector, as shown in Complainant's Exhibit 13?

A. It was used as a stiffener, covered by a facing; as a protector, I should think it would be an absurdity.

Int. 40. You have stated in answer to the 14th interrogatory that, referring to Respondents' Exhibit 9, the dress would be likely to turn up and expose the white back of the enamel cloth;

would a skirt cut straight, not gored, be more likely to curl up and expose the white back of the enameled cloth?

A. It would.

Int. 41. You said in answer to 27th interrogatory, "I think in 1863, one of William Clapp's clerks sent it round to me," speaking of Complainant's Exhibit 17, "to see if I could use it for skirt facing;" please state, if you remember, whether or not a piece of cambric was attached to that piece of enameled cloth so sent you in 1863?

A. There was.

Int. 42. Please state whether or not an article like Respondents' Exhibit 10 could be used as a facing on a gored skirt?

A. It would not be dssirable in this shaps; I mean like Exhibit 10.

Int. 43. Supposing there were in the market straight strips of enamel cloth three or four inches wide, and of any requisite length for facings of the thick grade; could such strips be cut circular like Complainant's Exhibit 20 (half circular I mean), or would it be necessary to purchase larger pieces of cloth to cut them out, as shown in Exhibit 20?

A. It would be necessary to purchase wider pieces.

CROSS-EXAMINATION by Jabez S. Holmes, Esq.:

Cross-Int. 44. You have said, I believe, that gored skirts first came into Boston in 1865; are you able to say whether or not there were gored skirts in Boston before 1865?

A. I did not say so.

Cross-Int. 45. Are you able to say of your own knowledge whether or not gored skirts were worn in Boston before 1865?

A. They were as evening dresses, not as short dresses; long evening dresses, or as long morning dresses.

Cross-Int. 46. What do you mean by morning dresses?

A. Such dresses as I make for ladies to wear in their chambers or to breakfast.

Cross-Int. 47. Do you know whether or not gored dresses, not morning dresses, or dresses worn in ladies' chambers, were worn in Boston before 1865?

A. We occasionally made a style of dress called by some "Princess dress," waist and skirt being cut of one piece—no joining at the waist. Those dresses were invariably looped up upon the inside by various means applied to the seams, festooning them in regular festoons, clearing them entirely from the possibility of coming in contact with stairs while descending, or any floor, or any sidewalk, or any other dirty thing. That style extended over a period beginning as early as 1858, and continuing into 1865 with elegant dresses. I mean by elegant dresses moire antique, velvet or thick silk—nice silk. There was always a nice distinction between the make-up of such goods and worsted materials, or worsted and cotton, or worsted and silk.

Cross-Int. 48. Will you please answer my last question?

A. I have told you of the Princess dress; that is gored, severely gored.

Cross-Int. 49. Will you be good enough to answer the 47th cross-interrogatory or decline to answer it?

A. I certainly do not decline. Could I think of another word to answer to the fulness of the reply I should do so with pleasure.

Cross-Int. 50. Are you not able to state whether or not you know that gored dresses, not morning dresses or dresses worn in ladies' chambers, were worn in Boston before 1865?

(Objected to as having already been answered.)

A. Did he purposely omit evening dresses? I have stated evening dress. I have told you all I know about it. Short gored *walking* dresses came in vogue to the best of my knowledge—the first intimation I had that they were to come in style was July, 1865.

Cross-Int. 51. Is that all that that you know about gored dresses and when they were first worn in Boston?

(Objected to as having been fully answered.)

A. I have not another word to add to my reply to that question; my knowledge of dressmaking is not to be discussed here.

Cross-Int. 52. I believe you have stated that strips of cambric and enamel cloth, like Respondents' Exhibit 10, could not be applied to a gored dress; am I right?

A. Not as I was in the habit of doing my work. I should never think of applying it. I should consider it decidedly impracticable.

Cross-Int. 53. Why should you consider it impracticable to apply such a strip to a gored dress, supposing, of course, it is long enough to be applied to a gored dress?

A. Before me I have a newspaper which I shape like the back breadth of a gored dress; I have also before me a strip of wiggan two inches in width, which we will apply to the very bottom of the dress in order to have it bound in with the braid; then what are you going to do with the top? Although but two inches wide it is impossible to fasten it to the top without Mrs. Trafton's slashes, making it a ragged, untidy, superfluous rubbish.

Cross-Int. 54. Is the strip of wiggan to which you have referred to in last answer, labelled Day's patent dress facing, marked by examiner respondent's Exhibit?

A. I only notice it as a piece of wiggin. I presume it is the same piece. I only notice it as a piece of straight wiggin.

Cross-Int. 55. Would there be the same difficulty in applying Complainant's Exhibit 3 to the bottom of a gored skirt?

(Objected to as not defining whether as a facing or a protector.)

A. For what purpose?

Cross-Int. 56. For the purpose of protecting the bottom of such gored skirt from wear and soiling.

A. I never saw a protector bound in at the bottom with a braid as illustrated by Respondents' Wiggan Exhibit . We spoke of it as being bound in with braid.

Cross-Int. 57. Without regard to the binding in of the article

with braid, could, in your opinion, Respondents' Exhibit Day's Patent Dress Facing be applied to the bottom of a gored skirt?

(Objected to for the reason that Mrs. Flynt has already stated that she knows nothing about Day's patent, and that she only picked up that piece of wiggan, supposing it to be a mere blank piece of wiggan, to illustrate her meaning why such a straight piece of cloth could not be applied to a gored skirt as a facing.)

A. I don't see how it can in its present condition.

Cross-Int. 58. Could Complainant's Exhibit 3 be so applied to the bottom of a gored skirt?

A. For what purpose?

Cross,Int. 59. Without reference to purpose can it be applied to the botom of a gored skirt?

(Objected to; it is not intelligible unless the purpose whether as a facing or a protector is asked.)

A. I see but one purpose for which it can be applied, and that admirably as a *protection*, coming below and outside of the braid or other bottom finish of the skirt; this is plaited, and small spaces left at the top between each plait; it is readily lapped from one to the other without being observed, giving the curve required to adapt it to half circle of the back of a gored dress.

Cross-Int. 60. Then if I understand you, the superiority of Complainant's Exhibit 3 over strips like Respondents' Exhibit 10 consists of the fact that it is plaited.

A. I have no opportunity of comparing the relative merits of the two articles, never having used any of them.

Cross-Int. 61. Would it, in your opinion, make any difference in the applicability of Complainant's Exhibit 3 to the bottom of a gored skirt whether or not the exhibit were all plain or plaited?

(Objected to as not defining what he means; whether a facing or a protector; whether the article is to be wiggan or enameled cloth.)

A. It don't seem to me that that question has anything to do with it. I see before me this article, Exhibit No. 3, made to be adapted to the gored part of a narrow dress, the sides of which would be straight as this appears.

Cross-Int. 62. Will you please answer the question?

A. Your question is either so deep in its wisdom or so shallow in its folly that it is beyond my comprehension.

Cross-Int. 63. Will you have the kindness to answer my question or decline to answer it?

A. I certainly do not decline; as to the best of my ability at the present time of listening (hearing music in the distance, and as music has charms, &c.), your savage demeanor fails to arouse any latent wit or wisdom I might otherise render as a reply.

Cross-Int. 64. Is that your only answer?

A. It is to that question.

DIRECT EXAMINATION resumed:

Int. 65. Please state if the exhibit now shown to you, represents the looped-up skirts you refer to in your answer to cross 47; this exhibit I now call your attention to, being marked Complainant's Exhibit No. 21.

A. It does.

Int. 66. Please state whether or not there would be any use of a protector on such looped-up dresses.

A. Not on the skirt.

Int. 67. Please hear cross-interrogatory 63 and the answer read again, and state whether or not you mean by that answer that you have answered that question (cross 63) as well as you can understand it.

A. I answered fully, in my judgment, everything the question did or could by any possibility suggest.

OLIVIA PARKER FLYNT.

Attest:

JOSEPH F. CLARK,
Special Examiner.

DEPOSITION OF JOHN B. THOMPSON.

JUNE 11, 1875.

DIRECT-EXAMINATION by George E. Betton, Esq.:

Int. 1. Please state your name, age, residence and occupation.

A. John B. Thompson; fifty years of age; 5 Hanover street, Boston; salesman for Harris, Chipman & Co.

Int. 2. Please state whether or not you have been engaged in any business; if so, what, which included the purchase or sale of enameled cloths; if so, between what dates first and last, and where?

A. I have been; carriage business; I was from 1848 to 1870, in this city and Cambridge.

Int. 3. Please look at Respondents' Exhibit, and state whether or not any such grade of enamel cloth was in the market, to your knowledge, in 1862, 1863, 1864, or when for the first time, to your knowledge?

A. I never saw anything so thin as that in my experience. We have enamel cloth in our store now, but not so thin as this; we do not use it so thin.

Int. 4. Please look at Complainant's Exhibit 17, and state whether or not that was about the grade of enamel cloth in use in those years.

A. That was as thin a grade as we ever used; we used thicker.

Int. 5. Please state if Mrs. Thompson, your former wife, is now living; if not, please state when she died.

A. She is dead. She died a year on the 12th of last December.

Int. 6. Please state if, while living, your wife was in the dress-making business; if yea, when and where?

A. She was. It was in October, 1867. She started in Avon place.

Int. 7. Please state if you had knowledge of her business, and of her employees.

A. To some extent.

Int. 8. Please state if you knew a Mrs. Jane M. Kittridge; if yea, please state whether or not she was in your wife's employ in Avon place, and how long she remained there; from what time, to what time.

A. I knew her as Jane M. Carroll; she went by her maiden name in that time. She was in my wife's employ; they remained there about a month, and then she and my wife went to 164 Tremont street. I think she worked for my wife up to the next spring sometime; I couldn't say to what month.

Int. 9. Please state if she was in partnership with your wife, or hired by her merely.

A. She was not in partnership; she was hired.

Int. 10. Please state how she came to leave.

A. I don't know as I care to go into particulars on that.

Int. 11. Please state if there was any trouble between her and your wife.

A. I'd rather you wouldn't question me on those points.

Int. 12. Please state whether or not hair-cloth, like Complainant's Exhibit 8, or substantially like that, was used at your wife's establishment when Mrs. Kittridge, or Miss Carroll, was there.

A. It was. I've seen it there.

CROSS-EXAMINATION by Jabez S. Holmes, Esq.:

Cross-Int. 13. How long was your wife in business as a dressmaker; up to what date?

A. Well, up to about two months before she died.

Cross-Int. 14. In what places?

A. She had been in Hanover street, and with Shepard & Norwell on Winter street; Avon place and Tremont street.

Cross-Int. 15. Was she first in business for herself in Avon place?

A. She was first in business on Hanover street for herself; then in the employ of Shepard, Norwell & Co.; then on Avon place for herself.

Cross-Int. 16. After she left Avon place, was she in business for herself, and where?

A. She was, at 164 Tremont street.

Cross-Int. 17. When did she move from Avon place?

A. She only stayed one month in Avon place, then she hired more commodious rooms at 164 Tremont street. I think it was October, 1867.

Cross-Int. 18. How many hands did she employ while at Avon place?

A. I think there were five.

Cross-Int. 19. When did you last see Mrs. Jane M. Kittridge?

A. I think it was something like five years ago I saw her last.

Cross-Int. 20. What was your business while your wife was in Avon place?

A. Carriage making and repairing.

Cross-Int. 21. Did you have anything to do with her business during that time?

A. No, sir.

Cross-Int. 22. Did you live with her during that time?

A. Yes, sir.

Cross-Int. 23. How do you know that Mrs. Jane M. Kittridge worked for your wife while your wife was in Avon place?

A. My wife told me that she had hired her, and I have seen her pay her Saturdays, when she paid the rest of her help.

Cross-Int. 24. Is that all you know about it?

A. I heard them talking the affair; she wanted—that is, Miss Carroll, or Mrs. Kittridge wanted—her own customers to understand she was in business for herself; she thought it would be better.

Cross-Int. 25. Was Mrs. Kittridge at work with or for your wife after your wife left Avon place; how long did she work for your wife?

A. Worked for my wife at Tremont street sometime until the next spring; I think she worked for her in all about six months.

Cross-Int. 26. What was the arrangement between Mrs. Kittridge and your wife, if you know?

A. I think she paid her $25 per week; there was no other arrangement that I know of.

Cross-Int. 27. Was there the same arrangement between them after Mrs. Thompson moved to Tremont street as there was while she was in Avon place?

A. No change that I know of.

Cross-Int. 28. Do you know anything at all about it?

A. I know what I have told you, and that's all about it.

Cross-Int. 29. Do you know anything more about the arrangement between Mrs. Thompson and Mrs. Kittridge than you have told; if so, what is it?

A. There was no other arrangement.

Cross-Int. 30. (Question repeated, and objected to as being already fully answered.)

A. I don't know how I can answer it any differently; I know there was no other arrangement.

Cross-Int. 31. What makes you think that Mrs. Jane M. Kittridge and Miss Jane M. Carroll are the same person?

A. It was not conceived in thought; it is a matter of fact; Carroll was her maiden name, and she was known in the dressmaking fraternity as Carroll.

Cross-Int. 32. What makes you think that the person who worked for your wife in Avon place and Tremont street, as you say, is the person known as Mrs. Jane M. Kittridge?

A. I was introduced to her as Mrs. Kittridge, known as Miss Carroll, at the time she came to Avon place.

J. B. THOMPSON.

Attest: JOSEPH F. CLARK,
Special Examiner.

Deposition of Olive H. Pittman.

June 11, 1875.

Direct-examination by George E. Betton, Esq.:

Int. 1. Please state your name, age, occupation and residence?

A. Olive H. Pittman; thirty-two years old; West Somerville; not in any business.

Int. 2. Please state what business you have been employed in, and when you began, and with whom and how long you continued in such business?

A. Have been bookkeeper; in the millinery and dressmaking; also gas fixture business; began in 1859 with Crosby & Coverly; continued with them until they dissolved in, I think, 1860; continued with J. W. Coverly & Co. until his failure, January, 1869.

Int. 3. Please state if Crosby & Coverly, and afterward J. W. Coverly & Co., were engaged in the millinery and dressmaking business, and if that included the sale of dress facings.

A. Messrs. Crosby & Coverly were engaged in millinery; J. W. Coverly & Co. were engaged in millinery and dressmaking; it did include the sale of dress facings.

Int. 4. Do you know the distinction between dress facings and dress protectors? If yea, please look at Complainant's Exhibit 14, and say what piece of enamel cloth attached to the bottom of the skirt is called, and what that piece of enamel cloth attached to the bottom of the skirt Complainant's Exhibit 13 is called.

A. I do, sir; a dress facing at the bottom of Exhibit 14; I should consider this (Exhibit 13) a dress protector.

Int. 5. Please look at Respondents' Exhibit No. 7, and state whether or not any such grade of enamel cloth was sold while you were at Crosby & Coverly's, or J. W. Coverly & Co.'s for any purpose.

A. It was not, sir.

Int. 6. Please look at Complainant's Exhibit 8, and state whether or not any such article substantially like that, was sold, and for what purpose, while you were at J. W. Coverly & Co.'s.

A. It was sold for dress facings, between the years 1862 and 1869.

Int. 7. Please state, if you know, how skirts of dresses were made in 1860, 1861, 1862, 1863, and in that connection please look at Complainant's Exhibit 18, and state whether or not that represents the style of full-skirt dresses worn in those years.

A. The skirts were made full in 1860 and 1861 and not gored; I do not remember particularly about them in 1862 and 1863. Complainant's Exhibit 18 does represent the style worn in 1860; gored skirts were not brought into use until 1865.

Int. 8. Please state whether or not a protector, as you have defined it, and as shown in Complainant's Exhibit 13, must come below the lower edge of the skirt of a dress and between

that lower edge (and the braid thereof) and the sidewalk in order to serve as a protection to that lower edge.

A. A protector for a dress must come below the braid in order to protect the dress facing and the braid.

Int. 9. Please look at Complainant's Exhibit 19, and state if that illustrates short dresses and gored dresses, as you have spoken of as coming in in 1865.

A. This is a style which began in use in Boston in the latter part of 1865.

Int. 10. Please state whether or not there would be any use for enamel cloth facings or protectors on such style of dress as shown in Complainant's Exhibit 19.

A. There would not.

Int. 11. Please state whether or not such an article as Respondents' Exhibit 10 (as you say), a straight piece of cloth, could be attached successfully to the bottom of a gored skirt.

A. It could not.

Int. 12. Please look at Respondents' Exhibit 11, and state whether or not that piece of enamel cloth thereto attached could serve as a protector (as you have defined protectors) to the fluted ruffles thereon.

A. It would not.

Int. 13. Please look at Respondents' Exhibit 13, and state whether or not a piece of enamel cloth thereto attached would serve as a protector, as you have defined protectors.

A. As it is it would answer the purpose of a protector.

Int. 14. Would that piece of enamel cloth serve to protect the braid on that Exhibit 13, or should it extend below the braid and come between the braid and the sidewalk in order to be a protector like Complainant's Exhibit 13?

A. A protector should come below the braid like Complainant's Exhibit 13; if this Respondents' Exhibit 13 was fastened at the bottom, bound by the braid, it would become a facing, and is not a protector.

Int. 15. Then, if I understand you, this piece of enamel cloth, like Respondents' Exhibit 13, if it does not extend below the braid, and coming between the braid and sidewalk it would not be a protector: am I right?

A. You are right.

Int. 16. This piece of enamel cloth, Respondents' Exhibit 13, does not come between the braid on this exhibit and the sidewalk, does it?

A. It does not.

Int. 17. And therefore it is not a protector as you have defined protectors as shown in Complainant's Exhibit 13, is it?

A. It is not.

Int. 18. Supposing that the piece of enamel cloth, as shown in Respondents' Exhibit 13, not extending below the braid of the skirt, were left loose and not sewed down; would that be any more of a protection?

A. It would for the dress; not for the braid.

Int. 19. Is it not essential and necessary that the braid should

be protected on the lower edge of the skirt from wear and wet; I mean the braid on the lower edge of the skirt?

A. It is very essential to have the braid protected.

Int. 20. Please state how far the enamel cloth should extend below the lower edge of skirt, and the braid thereon, in order to serve as a protection to the braid?

A. I should think it should come from three-fourths to one-half inch below.

Int. 21. Please state whether or not, if a piece of enamel cloth were attached as shown in Respondents' Exhibit 13, the dress upon getting wet would not curl up and show the white back of the enamel cloth, if it were not sewed down and bound in with the braid.

A. I should think it would be most likely to.

Int. 22. Please look at Complainant's Exhibit No. 3, and state whether or not that fluted or plaited form of protector would be better adapted to the trail of a gored skirt than a plain piece not fluted or plaited, and why?

A. It would be much better; a plaited piece or fluted would hang much better on a gored dress, and with an enameled or rubber piece at the bottom would serve as a protection from wet and soil; a straight piece could not be put on a gored dress.

Int. 23. And if I understand you correctly, this piece of rubber cloth on Complainant's Exhibit 3 should extend below the lower edge of the skirt from a half to three-quarters of an inch, in order that the lower edge of the skirt and the braid thereon should be protected; am I right?

A. You are, sir.

Int. 24. Now supposing that such an article as Complainant's Exhibit 3, whether plaited or fluted or plain, if the plain piece could be successfully applied to the bottom of a gored skirt (I mean like the end of Complainant's Exhibit 3, which is not plaited or fluted), supposing that it, Exhibit 3, should be attached to the lower edge of a skirt, but not allowed to extend below the lower edge of the skirt, would it then be anything at all, protector or facing?

A. I should think it would be better not to use it at all; it would make the dress very clumsy and cumbersome.

Int. 25. Please state if you know Mrs. Jane M. Kittridge, and whether or not she was in the employ of J. W. Coverly & Co., and when she came there, and how long she remained?

A. I do; she was then known as Miss Jane M. Carroll; she was in the employ of J. W. Coverly & Co; she came there about 1862; she remained about three years.

CROSS-EXAMINATION by Jabez S. Holmes, Esq.:

Cross-Int. 26. What do you mean by protector?

A. An enameled or rubber cloth, or any material which comes below the bottom of the braid to protect the dress or facing from wet or dirt.

Cross-Int. 27. What do you mean by facing?

A A material which is fitted to the bottom of the dress skirt and is fastened by a braid or cord at the bottom.

Cross-Int. 28. If Respondents' Exhibit 10 were so applied to the skirt of a dress as to bring the bottom edge of the enameled cloth from one-half to three-quarters of an inch below the bottom of the skirt, would that, in your opinion, be a protector?

A. I should say Exhibit 10 could not be used on the bottom of a gored dress for a protector.

Cross-Int. 29. I asked you in the last question whether if Respondents' Exhibit 10 were so applied to the skirt of a dress as to bring the bottom edge of the enameled-cloth one half or three-quarters of an inch below the bottom of the skirt, whether that would, in your opinion, be a protector; will you please answer that question?

(Objected to as she has already stated it could not be applied to the bottom of a gored dress).

A. I think it could not be used as a protector, as the edge would most likely ravel, and would turn over so as to show the white lining.

Cross-Int. 30. Will you be good enough to answer the question?

(Objected to as it is fully answered.)

A. I've answerd it to the best of my ability.

Cross-Int. 31. Will you please state whether or not, in your opinion, Respondents' Exhibit 10, so applied to the skirt of a dress, would be a protector?

(Objected to as having been fully answered twice or three times.)

A. It would not?

Cross-Int. 32. Why not?

A. For reasons already stated.

Cross-Int. 33. Would it not protect the skirt of the dress from wet and soil and wear?

A. I think not.

Cross-Int. 34. Why not?

A. The material being a raw edge I should judge it would ravel, thereby collect the dirt; also being a raw edge, would turn over and occasion the dirt and soil to collect on the bottom of dress.

Cross-Int. 35. Supposing the bottom edge of the enameled cloth of Exhibit 10, so applied, as in the previous question, to a skirt, were bound with a braid, would it then, in your opinion, be a protector?

A. It would.

Cross-Int. 36. Suppose the bottom edge of the enameled cloth of Exhibit 10, so applied to a skirt, were hemmed instead of bound with a braid, would it then, in your opinion, be a protector?

(Objected to as assuming that such an article as Exhibit 10 could be applied to a gored skirt, as she has already stated it could not.)

A. It could not be used upon a gored dress.

Cross-Int. 37. Will you please answer the last question?

(Objected to as having been fully answered.)

A. I think it could not be used as a protector on any dress, whether gored or not; it could be used, but not as a protector.

Cross-Int. 38. Why not as a protector?

A. Because the material of itself is not suitable for a protector; it should be a rubber cloth which would shed the water.

Cross-Int. 39. Would Respondents' Exhibit 10, so applied and hemmed, be, in your opinion, a facing; that is, the bottom of the enameled cloth extending one half to three quarters of an inch below the bottom of the skirt and hemmed?

A. I never knew a facing to extend below the bottom of a dress; it would not, in my opinion, be a facing; it would be a useless article on a dress.

Cross-Int. 40. If rubber or rubber cloth were substituted for the enameled cloth of Respondents' Exhibit 10, and so applied to the skirt of a dress that the bottom of the rubber or rubber cloth extended one half or three quarters of an inch below the bottom edge of the skirt of the dress, would that, in your opinion, be a protector?

A. A protector as I have described should be made of a rubber cloth or of some material which would shed the water, and should come from one half to three quarters of an inch below the dress, between the braid and the sidewalk; Respondents' Exhibit 10 could not be fitted to a gored dress if made of rubber; it would be a protector for a plain straight dress.

Cross-Int. 41. Supposing the dress were hemmed at the bottom of the skirt and not bound with a braid, and Respondents' Exhibit 10 were applied so as to bring the bottom of the enamel cloth one half to three quarters of an inch below the hemmed bottom of the skirt, would that be a protector?

(Objected to as not defining whether a plain or gored dress.)

A. I cannot conceive of a lady's dress being completed without a braid or cord at the bottom; nothing but a calico or print, which would not need a protector, is hemmed at the bottom.

Cross-Int. 42. Suppose a cord around the bottom edge of the skirt of the dress instead of a braid, and Respondents' Exhibit 10 applied, as in the last question; would Respondents' Exhibit 10 then be protector?

(Objected to, as she has already stated Exhibit 10 could not be used as a protector, except on a straight skirt when coming below.)

A. I have answered to the best of my knowledge; I have said previously that if it came below a cord or a braid it would be a protector.

Cross-Int. 43. Does it make, in your opinion, any difference in the operation of a protector whether or not it is plaited or fluted or plain?

A. It makes a great difference; if used on a plain dress, not gored, it might be used straightway; if on a gored dress it must

be fluted or plaited; I mean a straight piece of cloth not cut on the bias.

Cross-Int. 44. Will you examine Complainant's Exhibit 3, and state whether that cloth is cut straight or on the bias?

A. It is cut straightway, not on the bias.

Cross-Int. 45. Please look at Complainant's Exhibit 13, and say whether or not the bottom edge of the enameled cloth on that Exhibit is a raw edge or not?

A. It is a raw edge, cut bias.

Cross-Int. 46. You have said, I believe, that a plaited protector could be applied to the bottom of a gored skirt, and a plain protector could not; why can a plaited protector be more easily applied to a gored skirt, in your opinion?

A. A straight, plain protector could not be fitted to a gored skirt, as the skirt is sloped around the bottom. You cannot fit a straight piece to a half circle.

DIRECT-EXAMINATION resumed:

Int. 47. You have stated in answer to the 5th interrogatory that no such enamel cloth like Respondents' Exhibit 7 was sold while you were at Crosby & Coverly's, or at J. W. Coverly & Co.'s, please state if any such article like Respondents' Exhibit 7 was used while you were at either place, for any purpose, to your knowledge.

A. It was neither sold nor used, as I should have known it if it had been.

CROSS-EXAMINATION resumed:

Cross-Int. 48. Did not customers frequently come into those stores with trimmings for dresses and other articles, hats and bonnets, to be applied to their dresses, hat and bonnets, and other articles, as the customers directed.

A. They did, whenever a dress was completed. I took a memorandum of items used in the dress, before it went out.

OLIVE H. PITTMAN.

Attest,

JOSEPH F. CLARK,
Special Examiner.

DEPOSITION OF HELEN MARIE MACDONALD.

JUNE 12, 1875.

DIRECT-EXAMINATION by George E. Betton, Esq.:

Int. 1. Please state your name, age, residence and occupation?

A. Helen Marie Macdonald; thirty-five years of age; residence, Boston; being out of health, I am not in any business at present.

Int. 2 Please state if you were formerly in dressmaking business, and where you first commenced, and when, either as employee or for yourself.

A. I was formerly in dressmaking business; learned my trade in Baltimore, Maryland; commenced in 1861 as an employee; commenced for myself in 1868.

Int. 3. Please state how skirts of dresses were made in 1861 and prior, as to length and fullness of skirts?

A. They were made very full, and generally long enough to touch the ground, sometimes more than to touch.

Int. 4. Please look at Complainant's Exhibit 18, and state if that illustrates the fullness and length of skirts of dresses in 1860, and up to what time did they continue so full and long?

A. This illustrates the skirts of dresses worn in those years; there was no material change until the latter part of 1865.

Int. 5. Please state what that change was in the latter part of 1865, as you have said, and in that connection please look at Complainant's Exhibit 19, and state whether that illustrates the change you have spoken of?

A. It was a change from those full straight skirts to short gored skirts. Complainant's Exhibit 19 illustrates the change I spoke of (the short gored skirts). The short gored skirts came in in 1865.

Int. 6. Please state whether or not hoop-skirts and skirts looped up were in fashion about 1862 or 1863, or what time, to your knowledge, and in that connection please look at Complainant's Exhibit 21, and state if that illustrates such hooped and looped-up dresses?

A. Hoop skirts were worn in 1862 and 1863, and were worn very large. Dress skirts were looped up in those years. Complainant's Exhibit 21 is a good illustration of the large hoops, also the looped-up skirts worn over them.

Int. 7. State, if you please, the distinction between dress facings and dress protectors, and illustrate the difference by referring to Complainant's Exhibits 13 and 14, and state which piece of enamel cloth is the facing and which the protector.

A. There is a wide distinction between them A dress facing is made up with the dress and forms a part of it. A skirt protector is put on over this facing; it generally goes between the lower edge of the dress and sidewalk, extending below the edge of the dress; a dress may be and is complete without the protector, but no dress is complete without a facing. Complainant's Exhibit 13 illustrates a gored skirt; it has a facing and a protector over the facing and coming below the edge of the dress. The cambric facing to this dress (Exhibit 13) is gored or cut to conform to the dress, which is gored; it is bound in with the braid, therefore forms part of the dress. The protector is put on outside of the facing, and it is at the option of the wearer to have it at all or not, It forms no part of the dress. Complainant's Exhibit 14 illustrates a straight skirt, such as was worn previous to 1865 and 1866, and it also illustrates Mackee's combination facing, which was intended for such straight skirts, and can be applied to no other than straight skirts. It can not be applied to gored skirts.

Int. 8 Please state when for the first time the piece of enamel cloth annexed to Complainant's Exhibit 13 was made, to your knowledge.

A. Such cloths—I cannot state when such cloth was woven,

but it was waterproofed—that is, this cloth was first made for protectors in the fall of 1873. There was no cloth in the market suitable to make waterproof skirt protectors of in 1873, so I bought this goods and had it waterproofed for the purpose of making skirt protectors.

Int. 9. Please state how the piece of enameled cloth, as shown on Complainant's Exhibit 13, is cut so as to conform it to the bottom of that gored skirt.

A. It is cut bias.

Int. 10. State what is the effect of cutting a piece of cloth on the bias?

A. Cloth cut on the bias is much better to work with; it is more elastic, and will conform more readily or easily to the shape of the dress skirt than a piece of the same cloth cut on the straight.

Int. 11. Do you mean that you cut it bias to make it conform more easily to the bottom of a gored skirt, or not?

A. I do. It also wears better when cut bias than when cut straight.

Int. 12. Will a piece of cloth cut bias like Complainant's Exhibit 13 be liable to ravel out on the lower edge?

A. It cannot ravel if cut bias.

Int. 13. State when you first formed in your mind the idea of a dress protector, as you have defined dress protectors.

(Objected to as being immaterial and incompetent.)

A. I made my first skirt protector in the fall of 1861.

Int. 14. The question I asked you was, when you first formed in your mind the idea of a skirt protector, as you have defined skirt protectors.

(Objection repeated.)

A. I had formed it in my mind some years previous to 1861; somewhere between 1854 and 1861.

Int. 15. Please state when you had so fully formed and completed in your mind such protector, so that you could and did make one and apply it to a dress.

(Objection to same repeated.)

A. It was so completed in my mind that I could and did make one and apply it to a dress in December, 1861.

Int. 16. Please state if the article now handed to you, and marked Complainant's Exhibit 22, shows the skirt protector as then made it and attached it, as you say, in December, 1861, to a dress.

(Objection repeated.)

A. It does.

Int. 17. Was that the lightest piece of enamel cloth that you could find at that time for that purpose?

(Objection repeated.)

A. I could find no enamel cloth lighter than that at that time.

Int. 18. In this exhibit (Complainant's Exhibit 22) the enamel cloth appears to be covered on the back side with a piece of alpaca; for what purpose was that?

(Objection repeated.)

A. For the purpose of covering up the white back or foundation of the enamel cloth, which if not covered would have shown beneath the lower edge of the dress, and would have been very objectionable.

Int. 19. Please state, if you know, whether or not any lighter grade of enamel cloth like Respondents' Exhibit 7 was in the market in 1861 or 1862 or 1863, or when for the first time, to your knowledge.

A. It was not in the market in those years; at least, if it was, I could not find it; for I inquired for it in stores where it was usually kept—in stores in Boston and in Lowell; was told there was nothing in the market lighter than this piece in Complainant's Exhibit 22; I should say cloth like Respondents' Exhibit 7 was not made as light as this until 1865.

Int. 20. Please state whether or not you experimented with the protector, substantially like Complainant's Exhibit 22, and to what extent.

(Objected to as both immaterial and incompetent.)

A. I did not experiment with protectors like Exhibit 22; I used them on four of my own dresses.

Int. 21. Please state whether or not you so constructed your protector, and attached it to the skirt so as to extend below the lower edge of the skirt to serve as a protection thereto, and to the braid thereon.

(Objected to as immaterial and incompetent, and for form.)

A. I made my protector and sewed it upon the skirt so that it would come below the edge of the skirt or between the lower edge of the skirt and the sidewalk, so that it should protect the braid on said skirt.

Int. 22. Please state how long you continued to use such protector on the skirts of your dresses.

(Objected to as immaterial and incompetent.)

A. I had one or more of those dresses in my possession—dresses with protectors on until the summer of 1869.

Int. 23. What became of them if you know?

(Objection repeated.)

A. I ripped the last one out in 1869 to gore the skirt; the others, I presume, found their way to the rag-bag.

Int. 24. If I understand you correctly, the enameled cloth on Complainant's Exhibit 22 was attached to a straight skirt, not gored; am I right?

A. It was attached to a straight skirt; all protectors I put on between 1861 and 1865 were put upon straight skirts, I never put a protector on a gored skirt till 1872.

Int. 25. Please state how the protectors, attached as you have stated, operated to protect the lower edge of the skirt from dirt and wet?

(Objection repeated.)

A. They operated well.

Int. 26. Did you ever allow or know of the use of such pro-

tector by any other person than yourself prior to your application for a patent?

(Objection repeated.)

A. I never did.

Int. 27. When did you first propose to make application for your patent, if you remember?

(Objection repeated.)

A. I began to renew my experiments with a view of making my application for a patent in November, 1872.

Int. 28. Please state what, if anything, prevented you from applying for a patent before this?

(Objection repeated.)

A. One great reason that I did not apply in 1861, 1862 or 1863 or 1864 was, because I was lacking means, and short dresses came into fashion in 1865, and as they were worn very short, no protector was needed again till 1872, when the skirts of dresses were again lengthened.

Int. 29. Then, if I understand you, in 1872 gored skirts were in fashion; am I right; and did they continue so in fashion up to the present time?

A. They came in in 1865, and have contiuued so ever since; and there is no prospect of their ever being made straight again.

Int. 30. You speak of resuming your experiments with a view of making application for a patent in November, 1872; what experiments were you making then, and with what view?

A. I made experiments with such enamel cloths as I could find; but I found none that I could use successfully till I had some made for myself.

Int. 31. Please state whether or not you were experimenting at that time, November, 1872, with a view of adapting your said protector to gored skirts?

(Objected to as immaterial and incompetent.)

A. I was, because no other skirts were made than gored skirts then.

Int. 32. You speak in answer to 30th interrogatory of some kind of enameled cloth which you experimented with, but which you could not use successfully, when you had some made yourself; in that connection please look at Complainant's Exhibit 23 and describe how that is made; over what, and if that answers your purpose as a skirt protector?

A. Exhibit 23 is the material I had made for my skirt protectors, and it answers the purpose admirably; the enamel I spoke of as experimenting with in 1872 was ordinary enameled cloth with a white back, which cannot, of course, be used successfully as a skirt protector; this Exhibit 23 is made of alpaca, rendered waterproof by a coating of india rubber, enamel or japan; I cannot state how it is done; I send my cloth to a mill, and they japan it for me, or enamel it; at another mill they coat it with india rubber.

Int. 33, Please state whether or not you mean to say that this particular exhibit, Complainant's Exhibit 23, is japanned?

A. It is.

Int. 34. Please state whether or not the composition you call enamel contains some india rubber, if you know?

A. I have been told it does, but do not know of my own personal knowledge.

Int. 35. Please state if this exhibit, Complainant's Exhibit 23, represents the length of protectors *now worn?*

A. The lengths sometimes vary from one and three quarters to two yards and a quarter.

Int. 36. Please state when rubber cloth like that as shown in Complainant's Exhibit 3 first came into the market, if you know.

A. Probably in 1873, and was first made for skirt protectors.

Int. 37. Supposing that there was any such thing as a protector, as you have described it, in existence in 1860 or 1861 or 1862, what sort of a protection would one of one and a half to two and a half yards in length be on the full skirts at that time in fashion?

A. A protector measuring from one and a half to two and a half yards would not occupy a space of more than one to two feet on these full skirts (as shown in Complainant's Exhibit 18), and would be no protection at all.

Int. 38. Please look at Respondents' Exhibit 9 and state whether or not the piece of enamel cloth thereon, intended, as I understand it, to come down even with the bottom of the skirt, and left loose and not sewed down, would be a protector or not, or what would you call it?

A. It is certainly not a protector; I call it a piece of enamel cloth daubed with ink on the lower edge to make it appear as if such a thing were actually worn, when it is really an impossibility in dress-making.

Int. 39. Please state whether or not a piece of enamel cloth so attached as described in the previous question would be any protection to the lower edge of a skirt or the braid thereon from dirt or wet.

A. It would not.

Int. 40. Could such a piece of enamel cloth as shown in Respondents' Exhibit 10 be attached successfully either as a facing or protector to the lower part of a gored skirt?

A. It could not, because it is straight, and a gored skirt has such a narrowing toward the top, and the shape of the bottom is curved, that this piece, being straight, could not be made to conform to the lower portion or part of the gored skirt. As to a protector, which is intended to go below the lower edge of the dress, the machine is here and shows for itself that it would be utterly impossible to apply it in that way. The exhibit is here and shows for itself.

Int. 41. What do you mean by machine?

A. I mean Respondents' Exhibit marked No. 10.

Int. 42. State, if you know, what that piece of enamel cloth with a piece of cambric attached like Respondents' Exhibit 10 is called, or was used for?

A. It is called Mackee's combination dress facing, and was

used for the old-fashioned straight skirt facing, and was bound in with the braid; consequently formed a part of the dress.

Int. 43. Look at Complainant's Exhibit 20, spoken of by Mrs. Olivia P. Flynt as a facing used by her in 1863, and state how that was to be applied to the straight skirts then in fashion.

[Objected to as incompetent.]

A. Mrs. Flynt dropped the back breadth of her skirts and rounded them at the bottom in order to give a graceful shape to the trail; consequently, she had to shape her facing to conform to the shape of the trail, rounded or circular either.

Int. 44. Was it then attached top and bottom as a facing, and bound in with a braid?

[Objected to as incompetent.]

A. It was.

Int. 45. Please look at Complainant's Exhibit 3, and state if that is constructed to be adapted to the bottom of a gored skirt?

A. It is.

Int. 46. Look at Respondents' Exhibits 15 and 16 and state whether or not a piece of enamel cloth could be attached successfully to the bottom of a gored skirt in that style, and whether they would be any protection to the lower edge of gored shirts?

A. No lady would wear a dress with the enamel cloth so attached; they are impossibilities in dressmaking; the lady who put these exhibits on (if I remember right) testified that she had sewed similar articles beneath the trail of a black dress, and I believe she stated that dress was not trimmed. The very weight of that enamel cloth, plaited up as shown in these exhibits, would spoil the hanging of any dress or skirt, and would also cause the lower edge of the dress to turn up and show the white foundation or back of the enamel cloth as plainly as if the enamel cloth were sewed upon the outside of the skirt; it would be no protection, because it does not go below the lower edge of the dress.

Int. 47. Please state if the *braid* on Respondents' Exhibit 16 makes it anything of a protector.

A. It does not; I think it absurd to put braid that is not waterproof on a piece of enamel cloth that is waterproof for a protector.

Int. 48. If such a piece of enamel cloth, like Respondents' Exhibits 9 or 13, were allowed to drag on the ground, would it or not fray out and show white threads, and curl up and show the white back of the enamel cloth?

A. If the enamel cloth was worn in this way it would very soon fray out and show white threads, and present a very dirty appearance; the edge of the dress would curl up and show the white back or foundation of the enamel cloth.

Int. 49. Look at Respondents' Exhibit 15, and state if a piece of enamel cloth could be slashed and then sewed up and applied to a skirt in that way?

A. Respondents' Exhibit 15 shows for itself that 'tis absurd. It would be a ragged affair and an impossibility in dressmaking.

Int. 50. Look at Respondents' Exhibit 11, and say if the enamel cloth thereon could serve as a protection to the ruffle on it?

A. It could not. The ruffle comes below the lower edge of the dress, and, as it is not waterproof, would of course soak up dirt and moisture.

Int. 51. Look at Complainant's Exhibit 20, and say if you ever applied a piece of enamel cloth like that, with the cambric attached for facings; if yea, state when and how you applied it.

(Objected to as immaterial,)

A. I did apply a piece of enamel cloth like Complainant's Exhibit 20, combined with cambric, in 1862. I applied it as a facing, bound in with the braid.

Int. 52. Say whether or not you attached it by sewing the piece of cambric to the facing, and then the lower edge of enameled cloth to the lower edge of the skirt, and then covered that lower edge of enameled cloth and the skirt with braid?

(Objection repeated.)

A. I attached it by sewing the cambric directly to the lining of the skirt of the dress. I mean the cambric that is combined with the enamel cloth. I then bound the edge of this enamel facing and the edge of the dress-skirt together with a braid.

Int. 53. Do I understand you that this was in your own dresses?

(Objection repeated.)

A. It was.

Int. 54. State cost of making dresses from 1860 up to 1865, as compared with cost since that time?

(Objection repeated.)

A. Between 1860 and 1865 dresses were so simply and plainly made, that the cost was usually from $1.50 to $5.00, according to material. Since 1865 dresses have been elaborately trimmed; there has been so much work put in street dresses that the cost of making them amounts to all the way from $10 to $50, and sometimes as high as $80 and $100.

Int. 55. Was this enameled cloth, like Complainant's Exhibit 20, too heavy for facings?

(Objection repeated.)

A. It was very heavy; but we were obliged to use it because nothing lighter could be found.

Int. 56. I wish you would state whether or not the sides of gored dresses just touch the ground, and therefore that a protector would need to project below the lower edge of the dress there as well as behind?

A. The sides of gored dresses usually touch the ground. A protector should project below the lower edge of the dress at the side as well as behind.

Int. 57. Say whether or not a dress would be complete without a facing?

A. It would not; I consider the facing forms part of the dress.

Int. 58. State if you used hair-cloth; if so, for what purpose, and when?

A. I have used hair-cloth as a stiffening for the bottoms of dresses. I used it for the first time in about 1868. I think hair-cloth and wiggan were always used as inner facings or stiffenings for the bottoms of dresses.

Int. 59. Could such a thing as hair-cloth, or such an article as Complainant's Exhibit 9, be used for a protector, as you have defined protectors?

A. They could not.

Int. 60. I believe I have not called your attention to Complainant's Exhibit 5: that shows also, does it not (or that part of it marked Macdonald's Patent, September 29, 1874), the method of attachment of your protector?

A. It does.

Int. 61. Does Complainant's Exhibit 6 show the method of attachment of what is called the Mackee's patent combination facing.

A. It shows Mackee's combination facing; also the manner it is to be attached to a dress.

CROSS-EXAMINATION by Causten Browne, Esq., and Jabez S. Holmes, Esq.:

JUNE 15, 1875.

Cross-Int. 62. How long did you live in Baltimore?

A. I went there about the 6th of March, 1861, and remained there until the fall of the same year.

Cross-Int. 63. With whom did you learn your trade in Baltimore?

A. With Mrs. E. W. Joy.

Cross-Int. 64. Where did you live just before you went to Baltimore?

A. In the town of Urbana, Virginia.

Cross-Int. 65. And where just before that?

A. In Houlton, Maine.

Cross-Int. 66. And where just before that?

A. I was born there.

Cross-Int. 67. Did you live there until you went to Urbana?

A. Yes, sir.

Cross-Int. 68. How long did you live at Urbana?

A. I believe two or three years.

Cross-Int. 69. Is that as near as you can state it?

A. Yes, sir.

Cross-Int. 70. How old were you when you left Houlton?

A. Somewhere between the age of fifteen and eighteen.

Cross-Int. 71. Who did you live with at Houlton; your parents or some other relatives or friends?

A. Part of the time with my parents; part of the time with my relatives and friends.

Cross Int. 72. Is your father living?

A. He is not.

Cross-Int. 73. Or your mother?

A. No, sir; my mother is not living.

Cross-Int. 74. Is there any living of those relatives or friends with whom you lived at Houlton?

A. Yes, sir

Cross Int. 75. Give their names and where they now live?

A. My sister, Mrs. Edwin Bedell, Linnews, Maine; Mrs. Moses Bond, Gold Hill, Nevada; Mrs. Harriet Johnson, Hodgdon, Maine.

Cross-Int. 76. With whom, if any one, did you go from Houlton, Maine?

A. I went alone.

Cross-Int. 77. With whom did you live at Urbana?

A. Mrs. John Bailey.

Cross-Int. 78. Is she still living; if so where?

A. I don't know whether she is living or not.

Cross-Int. 79. Where did she live when you last heard of her?

A. In Urbana, Va.

Croso-Int. 80. When was that?

A. 1861.

Cross-Int. 81. Will you state with what persons and at what times you were employed in dressmaking after leaving Baltimore until you started business in 1868 for yourself?

A. I was not employed in dressmaking after leaving Baltimore until I returned to Aroostook County, Maine, in 1866, I believe.

Cross-Int. 82. From the time you left Baltimore until you went to Aroostook County, Maine, how and where were you employed?

A. I had so many changes in those years that its utterly impossible for me to state positively just how and where I was employed.

Cross-Int. 83. State as much of it as you can.

A. To the best of my memory I went to school in Lowell a part of the year 1862; I think after that I was a clerk in a music store; I think after that I was some time in the employ of Andrew C. Mudge, Boston.

Cross-Int. 84. Is there any other place you can remember where you were after leaving Baltimore and before going to Aroostook, Maine?

A. I think I worked for Chandler & Co., in Boston, in those years; as I said before, I have had so many changes that 'tis impossible for me to state where I was in those years at any particular time.

Cross-Int. 85. Where was the music store where you were?

A. Dyer's music store, Central street, Lowell.

Cross-Int. 86. Whom did you live with in Lowell?

A. I boarded with Mrs. Mary Stone.

Cross-Int 87. During those years, from 1860 to 1866, were your parents living?

A. They were not.

Cross-Int. 88. Where were you living when you first put a

waterproof protector on a dress in the manner shown by Complainant's Exhibit 22?

A. In Lowell.

Cross-Int. 89. This you say was in December, in 1861; how do you fix that date?

A. Because I remember it was very soon after I came from Baltimore.

Cross-Int. 90. How do you know it was very soon after you came from Baltimore; what is the connection between these two subjects which helps you to fix the date one by the other?

A. The idea was in my mind before I left Baltimore.

Cross-Int. 91. Can you state any other reason that you have given for remembering it was in December, 1861, that you made and applied the dress protector in question?

A. Yes; I remember it because I was not employed in any business, and was waiting, and had hardly made up my mind what I should do.

Cross-Int. 92. Can you remember when you left Lowell?

A. I cannot.

Cross-Int. 93. State as nearly as you can?

A. It is impossible for me to state with any degree of certainty.

Cross-Int. 94. Couldn't you state whether you left there in 1862, 1863 or 1864?

A. As near as I can remember, it was 1864.

Cross-Int. 95. Is it your recollection that you went from Baltimore first to Lowell?

A. Yes, sir.

Cross-Int. 96. Then you lived in Lowell from the fall of 1861 to (according to your recollection) until some time in 1864; can you state when it was, during those years at Lowell, that you were unemployed?

A. I was unemployed in December, 1861, and was unemployed at times, very often, while I was there; I cannot state any more distinctly than that.

Cross-Int. 97. How do you know you were unemployed in December, 1861?

A. I can remember it from my memory; I remember it distinctly.

Cross-Int. 98. Can you state anything that you remember it by?

A. I cannot.

Cross-Int. 99. Can you give with equal certainty, as matter of recollection, each of the times when you were out of employment during your residence in Lowell; if so, please do it.

A. I cannot; and I have already stated to you that between the years of 1861 and 1866 I made a great many changes; I did not stay long in one place, and I cannot tell you with any degree of certainty just where I was during any of those years, or just what I was doing.

Cross-Int. 100. But you have told us, as matter of recollection, that you were out of employment in December, 1861, at Lowell;

you have also said you were out of employment a good many other times in Lowell; all I ask you now is whether you can remember the dates of the various times that you were out of employment at Lowell, as matter of recollection?

A. I can remember I was out of employment in December, 1861; I cannot give the dates of any other times.

Cross-Int. 101. Why can you give the date December, 1861, and no other date, out of many other times you were out of employment while at Lowell; is it because you think you made the dress protector like Complainant's Exhibit 22, in December, 1861?

A. That is one reason why I remember that I was out of employment at that time.

Cross-Int. 102. Can you give any other?

A. I can think of no other at present.

Cross-Int. 103. Then you remember you made the dress protector in question in December, 1861, because you were out of employment at that time, and you remember you were out of employment in December, 1861, because you made the dress protector at that time; is that what you mean?

A. I remember that I was out of employment at that time, and that I made the skirt protector at that time.

Cross-Int. 104. You say that you used dress protectors substantially like Complainant's Exhibit 22 in four or five of your own dresses; was that at Lowell?

A. I believe I put the protector on two or three of my dresses at Lowell, and as near as I can remember, one while in Boston.

Cross-Int. 105. What did you put the protector on more than one dress for?

A. To carry my experiments as far as I could, in order that I might know just how it would work as a protector.

Cross-Int. 106. Why did not the trial on the first dress satisfy you?

A. Because I preferred to experiment longer to understand just how the thing would work.

Cross-Int. 107. When you speak of a dress protector of this kind put on by you at Boston, what time do you refer to?

A. I cannot say positively, but should think in latter part of 1864.

Cross-Int. 108. Do you mean to say that you were engaged in experimenting upon the use of a protector like Complainant's Exhibit 22 for four years, with a view to understand its operation and merits and perfect it?

A. I do; I was experimenting in order to understand fully the merits of the invention; also I lacked means to have the invention patented at that time.

Cross-Int. 109. What was it that remained to be ascertained with a view to the improvement of the invention after you had worn it on the first of this series of dresses?

A. Wearing it upon one or two dresses did not really give me an opportunity to judge of its merits, and as I said before, I lacked means to have my invention patented.

Cross-Int. 110. I am not referring to the patenting of it; what are those papers you have in your hands and look at occasionally during your examination?

A. Sir, they have nothing to do with this case, and I am perfectly willing you should see them; I desire the magistrate to examine them and see if they have anything to do with the case.

Cross-Int. 111. I am not referring to the patenting of your invention; what I wish to know is this: after having had one dress with one of these protectors like Complainant's Exhibit 22 upon it, what information in regard to it would you obtain by making another protector just like it and wearing a second dress with it on; in other words, what would the use of the second dress show you that the use of the first had not shown you, each dress being provided with a protector like Complainant's Exhibit 22?

A. Experimenting with one dress, as I have said before, is not sufficient to show me the full merits of the skirt protector; besides, in experimenting, I sometimes varied the protectors in width; also I covered them each one differently in order to know which would be the best way.

Cross-Int. 112. What do you mean by covering them?

A. I mean that I covered the white back of the enamel cloth.

Cross-Int. 113. Did you not always cover the white back of the enamel cloth with about the same color as that of the dress itself?

A. Certainly; it would be absurd to say that I put enamel cloth in as a protector and did not cover the white back; I shouldn't suppose any one would say that unless they were insane.

Cross-Int. 114. What were the different ways of covering the protectors which you tried?

A. I don't know as I can explain it to you, but I can illustrate it on the exhibit; sometimes I brought the covering over as a binding; sometimes I sewed them together, as in Exhibit 22; at other times I would let the covering come up higher than the top of the enamel cloth, in order to attach it to the facing more conveniently.

Cross-Int. 115. Who drew the specifications annexed to your patent on which this suit is brought?

A. George J. Carney.

Cross-Int. 116. Was he the agent who got your patent for you?

A. He drew my specifications and helped me in my writing until an interference was declared; after that I had Gen. Benjamin F. Butler for my agent, who finished the case and obtained for me my patent.

Cross-Int. 117. After the interference had been finally decided in your favor, was not a new specification substituted for that which had originally been before the Patent Office?

(Objected to, as if there was it is a matter of record, which is the best evidence.)

A. I think my specification was amended.

Cross-Int. 118. Was not the entire specification, as it previously existed, replaced by another?

(Objection repeated.)

A. It was somewhat amended, but I can't say whether it was entirely by another or not.

Cross-Int. 119. Did you receive from the examiner at the Patent Office a pencil draft of the amendment to be made, or the specifications to be substituted, whichever way the first was?

(Objected to as being immaterial, and as a matter of record where the amendment was made.)

A. I have at different times received pencil drafts to be inserted in my specifications.

Cross-Int. 120. I refer particularly to the amendment which was made, or the substitution of the specification after the interference was finally decided in your favor; did you receive, at the time I speak of, a pencil draft which was either of an amendment or a specification to be substituted?

(Objection repeated.)

A. I received a number of pencil drafts; I cannot state positively if they were amendments or amended specifications; I shall have to look over my copies or consult Mr. Carney in order to answer positively.

Cross-Int. 121. What did you do with these pencil drafts?

(Objected to as immaterial and irrelevant, and as a matter of record if any such amendments were made.)

A. I usually did with them as I was instructed by the Patent Office; my application and specification were not properly made out, not being done by a person who had any experience in that business; therefore, I presume, amendments were necessary.

Cross-Int. 122. Can you remember any instance in which you did make such use of the pencil drafts coming to you from the Patent Office as was directed or suggested by the office?

(Objection repeated.)

A. I cannot.

Counsel for defendants puts in evidence, to be marked Defendants' Exhibit , a certified copy of the file wrapper, contents and drawings in the matter of Letters Patent granted H. M. Macdonald, dated September 29, 1874, No. 155,534, for improvement in dress protectors.

(Objected to as immaterial and irrelevant, and as the copy of the record appears to be, or rather the copy of the file wrapper and contents appear to have been, altered.)

Counsel for defendants requests counsel for complainant to point out what he refers to as alterations.

Counsel for complainant replies that 'tis quite evident, towards the end of the copies, that several matters have been erased by the aid of india rubber, or other foreign substances.

Counsel for defendants requests counsel for complainant to mark his initials at the foot of each page where he thinks he sees a sign of alteration.

Counsel for complainant cheerfully complies with the request of counsel for defendants, and so does.

Cross-Int. 123. It appears by the certified copy of the file wrapper and contents just put in evidence, that a letter was written to you from the Patent Office, dated September 10, 1874, signed H. Blandy, third assistant, in which occurs this: "It is therefore suggested to amend by erasing the whole of the present specification, except the petition, oath and signature, and substitute one copied from the enclosed pencil form;" and that you wrote to the Patent Office 12th of September, 1874, as follows:—

"*To the Commissioner of Patents.*

In the matter of my application for a patent for dress protectors, I hereby amend my specification by erasing the whole of the present specification, except the petition, oath and signature, and substituting the enclosed.

Respectfully,

HELEN M. MACDONALD."

And it also appears that a new specification was filed September 14, 1874, and nothing further appears to have been done in the case until the patent was ordered to issue September 26, 1874. From this I suppose that the specification filed September 14, 1874, on which your patent issued, was a specification written to you by some one in the Patent Office, sent to you in pencil, and by you copied out or caused to be copied out and returned to the Patent Office. Am I right?

(Objection repeated as incompetent, and as question seems to include quotations and remarks and conclusions drawn by the learned counsel which the record does not authorize.)

A. I never heard of the name of Blandy before; I may have received a letter, but it was not signed by Blandy. I had forgotten about the correspondence; could not have stated positively what it was without referring to my copies.

Cross-Int. 124. Between the time when you learned your trade in Baltimore, in 1861, and the time when you went into business for yourself, as you say, in 1868, were you employed as dressmaker? If so, when and by whom?

A. I did work at dressmaking after I returned to Aroostook County, in 1866 (I believe); worked a portion of the time for Miss Bird, and at other times went out by the day in families.

Cross-Int. 125. How long did you remain in Aroostook County?

A. I believe I went there some time in the year of 1866, and came back to Boston in the early part of 1868.

Cross-Int. 126. In what town or village of Aroostook County did you live during the time you were in that county in 1866–1868?

A. While I worked for Miss Bird I was in Houlton village; when I began to go out by the day I worked in the towns of Linneus, Hodgden, Houlton, and sometimes went over into New Brunswick as far as Richmond and Woodstock.

Cross-Int. 127. During this time had you any regular home in Aroostook County, or did you make your home in each of the places in succession which you have mentioned?

A. For most of the time I had one particular place that I called my regular home.

Cross-Int. 128. What place was that?

A. At Frank Green's in Hodgden.

Cross-Int. 129. Was he a relation of yours?

A. He was not.

Cross-Int. 130. Is he still living?

A. I believe he is.

Cross-Int. 131. What time in 1866 did you go to Aroostook County?

A. I don't remember precisely, but think it was in the first part.

Cross-Int. 132. What reason have you for thinking that?

A. As I remember it now the snow was very deep at that time, and I believe the sleighing broke up soon after I went there.

Cross-Int. 133. You have stated that you were out of employment many times while living in Lowell; can you state for how long a time you were out of employment, say in the longest of these intervals?

A. I cannot.

Cross-Int. 134. State as nearly as you can.

A. It would be impossible for me to do so with any degree of accuracy, and I may add that my experience in those years was the common experience of all friendless girls; that I had many changes and trials which are painful for me to think of, and which I have tried hard to forget.

Cross-Int. 135. I must, however, endeavor to ascertain how accurate your memory is, in order to judge of the value of your testimony so far as relates to matters of memory. Have you no recollection how long was the longest time that you were out of employment while you lived in Lowell?

A. I do not think that I can answer this question any differently.

Cross-Int. 136. Do you mean that you don't remember?

(Objected to, as the subject has been exhausted, not only in the last few interrogatories but at the beginning of the cross-examination.)

A. It means that I cannot state with any degree of accuracy the different times I was out of employment, nor how long I was unemployed.

Cross-Int. 137. You were not asked to so state; the question is this: do you or do you not remember how long was the longest time that you were out of employment while you lived in Lowell?

(Objection repeated.)

[After a long pause the witness asked to have the question read again, and it is read again.]

A. I was out of employment a number of times, as I said before, but I cannot remember which was the longest.

Cross-Int. 137a. Nor how long it was, I suppose?

(Objection repeated.)

A. Nor how long it was.

Cross-Int. 138. I suppose your income during the times that you had employment in Lowell was small?

A. My income was never large; I have never enjoyed a large income; but if I obtain justice in this case, which I confidently hope to, I shall in all probability enjoy an income which will be sufficient for all my wants.

Cross-Int. 139. During the time that you were employed in Lowell did your receipts exceed your necessary expenses?

A. I have always managed to live honestly and keep out of debt.

Cross-Int. 140. Won't you answer the question I put, and, if possible, speak of nothing else?

[The last question is repeated.]

A. And I have answered that question by saying that I have managed to live honestly and keep out of debt.

Cross-Int. 141. It is possible that you misunderstand me; I will put the question in this form: when you had employment in Lowell did you receive enough for it to be able to support yourself and put by something, or did it take all you earned to pay your necessary expenses?

[After a long pause.]

A. My answer is the same as before,—that I have always paid my bills and lived honestly.

Cross-Int. 142. How did you obtain the means of supporting yourself during the times you were out of employment in Lowell?

(Objected to as immaterial and irrelevant.)

A. I have always managed to keep something laid by for a rainy day,—something ahead.

Cross-Int. 143. Then why didn't you apply part of it to obtaining a patent?

(Objection repeated.)

A. Because I at no time had enough to obtain a patent and buy my sewing machines, which would be necessary, and a stock of goods to commence manufacturing with.

Cross-Int. 144. Did you take steps at any time while living in Lowell to ascertain the expense of applying for or obtaining a patent,—of course I speak of your residence in Lowell in 1861, 1862, 1863 and 1864?

A. Nothing further than to inquire the cost of obtaining a patent.

Cross-Int. 145. Of whom did you make that inquiry?

A. I do not remember.

Cross-Int. 146. How then are you able to swear that you made that inquiry at all?

A. I remember talking the matter over at the time with friends, and I think I asked one of them the cost.

Cross-Int. 147. Do you remember that friend's name?

A. Davis.

Cross-Int. 148. The full name, if you please, and residence?

A. William Davis, Middlesex Village.

Cross-Int. 149. Is he living?

A. I believe he is.

Cross-Int. 150. Was he a lawyer or a patent solicitor?

A. He was neither.

Cross-Int. 151. When did you first consult any lawyer or patent solicitor upon the subject of your patenting your dress-protector invention;

A. I made application, or began to, last of 1872 or first of 1873; I did it without consulting any patent lawyer or agent: I asked Mr. George J. Carney to assist me in writing the letters, but he is not a lawyer nor solicitor of patents, and I do not know that he ever had any experience in patent business until he kindly consented to assist me in making my application in the early part of 1873.

Cross-Int. 152. You have said that Respondents' Exhibit 10 could not be applied to a gored skirt, I believe; state fully all the reasons why it could not be applied to a gored skirt.

A. Respondents' Exhibit No. 10 cannot be applied to a gored skirt, because the shape of a gored skirt is curved or nearly circular, and this Exhibit No. 10 being straight could not be made to conform to the bottom of a gored skirt; facings used for gored skirts have to be made to fit the bottom of it; I can give no better reason for Mackee's combination dress facing, like Exhibit No. 10, going out of the market, than that they cannot be applied to a gored skirt; consequently when gored skirts were fully adopted there was no more demand for Mackee's combination dress facing.

Cross-Int. 153. What do you mean by "straight" in your last answer?

A. I mean that this Exhibit No. 10, which is Mackee's combination dress facing, is straight, and all his goods, I believe, are made in the same way.

Cross-Int. 154. Please state, and fully, what you mean by "straight"?

A. If you lay this Exhibit No. 10 flat on the table, or, even if you should take a twelve-yard strip of Mackee's combination dress facing and lay it out flat before you, you will see that the outside edges of the enamel cloth, or the combination of the enamel cloth and cambric, form parallel lines, or two straight lines parallel with each other.

Cross-Int. 155. Do you mean to say that if a strip, the same as Respondents' Exhibit 10, were laid on the table with the enamel cloth towards you, the edge of the enamel cloth next you and the edge of the cambric away from you would be parallel and straight?

A. It would certainly form two straight lines running in the same direction.

Cross-Int. 156. Will you please answer my last question definitely, it being now repeated?

(Objected to as being fully answered.)

A. It would certainly be a straight strip; the cambric is straight and the enamel cloth is straight.

Cross-Int. 157. Will you look at the smooth end of Complainant's Exhibit 3, and state whether or not the cambric and the waterproof edged are straight in that exhibit on that end?

A. Allow me to inform you, sir, that there is no cambric on Exhibit 3.

Cross-Int. 158. Will you look at the smooth end of Complainant's Exhibit 3, and state whether or not the *wiggan* and the waterproof edge are straight in that exhibit on that end?

A. This Exhibit No. 3 is arranged to fit a gored skirt admirably; the plaits in the back of this protector, which is made of very thin wiggan, can be let out or laid over so as to fit the bottom of a gored skirt exactly; the plain ends are also intended to fit the bottom of the back gore of the skirt which come nearly plain on the bottom.

Cross-Int. 159. If the plain ends of Complainant's Exhibit 3 were applied to a gored skirt, would that, in your opinion, be a protector, supposing that the waterproof edge came from one-half to three-quarters of an inch below the bottom of the dress?

(After a long pause.)

A. It would not be so easy to make it fit to the bottom of the dress, but the wiggan is so light and thin in this Exhibit No. 3 that it would do no harm to hold it a little full; if cut bias it could be made to fit very nicely.

Cross-Int. 160. (The 159th interrogatory is repeated.)

A. If cut bias and allowed to come below between the braid and sidewalk it might be some protection.

Cross-Int. 161. I did not ask you about an article cut bias, nor about a dress with a braid; I asked you whether in your opinion if a strip like the smooth end of Complainant's Exhibit No. 3 were applied to the bottom of a gored dress so that the waterproof edge should extend from one-half to three-quarters of an inch below the bottom of the dress-skirt, that would, in your opinion, be a skirt protector; please answer this question?

(Objected to as being fully answered.)

A. Anything that is waterproof coming below the lower edge of the dress and between the dress and sidewalk would be a skirt protector; but in order to make it fit nicely it should be cut bias; or if the material is very thin, like Exhibit 3, it may be laid in small plaits.

Cross-Int. 162. Suppose the material is not very thin and is not laid in small plaits and not cut bias, and so applied to the bottom of the skirt of a dress that the edge of the waterproof material is one-half or three-quarters of an inch below the bottom of the dress-skirt; would that, in your opinion, be a skirt protector?

A. As I said before, a strip of waterproof material coming below

the lower edge of the dress and between the dress and sidewalk is a skirt protector; and in order to illustrate my idea of a skirt protector, I will refer to Complainant's Exhibit No. 23, which is cut bias and has a plaited or fluted border which enables it to be applied easily to any gored skirt.

Cross-Int. 163. Is it the cutting bias or plaiting which enables Exhibit No. 23 to be applied to a gored skirt?

A. It is both.

Cross-Int. 164. What has the plaiting to do with it; the plaiting is made separate from the strip to which it is attached, is it not; and that strip is not plaited, is it?

A. The plaiting is ornamental, besides making the protector wear better; it also spreads out under the lower edge of the dress making the protector fit better, and much more easy to sew on.

Cross-Int. 165. What is the effect of cutting bias of which you have spoken?

A. Goods cut bias are more easy to work with; they are more elastic; they wear better and do not ravel on the edges.

Cross-Int. 166. Complainant's Exhibit No. 23 is straight, is it not?

A. It is not; it is cut bias, therefore cannot be straight; it is also rounded up and narrowed towards the end.

Cross-Int. 166*a*. If Complainant's Exhibit 23 were applied all around the bottom of the skirt of a dress so that the plaited edge projected one-half or three-quarters of an inch below the edge of the skirt of the dress, would that, in your opinion, be a skirt protector?

A. It would; but would be entirely unnecessary in front, and would also cut the boots badly.

Cross-Int 167. If Complainant's Exhibit 23 were applied to the bottom of the skirt of a dress so that the bottom edge of the plaiting came even with the bottom of the skirt of the dress, would it then, in your opinion, be a skirt protector?

A. It would not.

Cross-Int. 168. Is a strip like Complainant's Exhibit 23 applied to the bottom of the skirt of a dress so that the bottom of the plaiting extends from one-half to three quarters of an inch below the bottom of the skirt, any the less, in your opinion, a protector because it extends all around the skirt instead of only partly around it? By partly around I mean only upon the back breadths.

A. As I have said before, it would be entirely unnecessary on the front breadths, but it would still be a protector.

Cross-Int. 169. If Complainant's Exhibit 23 were so applied to a dress as to bring the bottom edge of the plaiting even with the bottom of the skirt of the dress on the back and front, would it, in your opinion, be a dress facing?

A. My Exhibits No. 5 and No. 13 show that a dress facing is made up with the dress—bound in with the braid; I think they illustrate exactly what a dress facing is; they also illustrate that

the protector is put on over the facing, and is entirely distinct and separate from the dress.

Cross-Int. 170. (The 169th interrogatory is repeated.)

A. It would not be a dress facing; it would be a useless incumbrance.

Cross-Int. 171. Nor a protector?

A. No.

Cross-Int. 172. You understand, I suppose, that I refer to dresses which drag, and not to short dresses, when I speak of facings and protectors?

A. I do.

Cross-Int. 173. Is Exhibit No. 3 cut straight, or bias?

A. It is cut straight.

Cross-Int. 174. You have spoken of an interference which was declared with your application for patent while it was pending at Washington; did you give a deposition yourself in that interference?

A. I did.

Cross-Int. 175. In that deposition did you state that in the year 1861 you had no business experience, and therefore could not be expected to think of applying for a patent?

(Objected to as immaterial and irrelevant, and as being capable of better proof by producing the record.)

A. It is impossible for me to state just what that deposition was.

Cross-Int. 176. Is it true, as a matter of fact, that in the year 1861 you had no business experience, and therefore could not be expected to think of applying for a patent?

(Objection repeated, after answer withdrawn.)

A. In the year 1861 my business experience was very small; still I thought of applying for a patent, and intended to do so just as soon as I had sufficient means to carry my plans into operation?

Cross-Int. 177. What were the plans which you intended to carry into operation?

A. To make application for a patent on this womanly invention of mine; viz., this waterproof skirt protector.

Cross-Int. 178. You did not carry out that intention, did you, when you got the means?

A. I did carry out that intention when I got the means and when such an article was needed (which was in the year 1872).

Cross-Int. 179. You have testified that in 1862 you applied a piece of enamel cloth, like Complainant's Exhibit 20, combined with cambric, attaching the cambric directly to the lining of the skirt of the dress, then binding the edges of this enamel facing and the edge of the dress-skirt together with a braid; will you tell us how you fix that time?

A. Yes, sir; I fix the time in this way; it was in 1862, and I was attending school in Lowell at the time.

Cross-Int. 180. Whose school?

A. James M. McCoy's.

Cross-Int. 181. Is he still living?

A. He is.

Cross-Int. 182. Does he still live in Lowell and keep school there?

A. He does.

Cross-Int. 183. What is the connection between the fact of your making this piece of work and your attending school at Lowell which makes you remember that you did this work while you were attending school?

A. I can remember the dress distinctly, and remember that it took me a very long time to make it, because I was attending school and studying, and got very little time to sew.

Cross-Int. 184. Have you any other means of fixing the date of doing this work, excepting that it was while you were at school at Lowell?

A. I have not.

Cross-Int. 185. Was this a day school or a night school?

A. Both.

Cross-Int. 186. Do you mean to be understood that you attended as a pupil day and night during the same time?

A. No, sir, I do not. I attended in the daytime, but I believe the school keeps open certain evenings in the week.

Cross-Int. 187. Do you remember during what hours in the daytime you attended?

A. I believe from 9 to 12 and from 2 till 4.

Cross-Int. 188. Was it a free school?

A. It was not.

Cross-Int. 189. I suppose that this was during one of the times that you were unemployed while living in Lowell: was it so?

A. It was. I certainly could not have been employed and attended day school at the same time.

Cross-Int. 190. Do you remember how long you attended this school?

A. I do not.

Cross-Int. 191. How nearly can you state the time?

A. I can't state with any certainty at all.

Cross-Int. 192. Was it as much as six months?

A. I do not think I could have gone to school there six months steady, because I was obliged to leave school and go to work; afterwards go back to school again. Unfortunately, my childhood and youth were spent in places where education was at a low ebb; I allude to the wilds of Maine; afterwards in Virginia where there were no public schools; consequently I have had to do all in my power since to make up for the deficiency.

Cross-Int. 193. Do you remember where you were employed between these two times of going to school at Lowell?

A. I cannot state positively, but I think at Cutter & Walker's.

Cross-Int. 194. What was their business at that time?

A. Manufacturers of skirt supporters, shoulder braces, &c.

Cross-Int. 195. What was your work there; was it in sewing or selling or in book-keeping, or which?

A. Stitching shoulder braces.

Cross-Int. 196. Can you tell us about how long you were there?

A. I cannot.

Cross-Int. 197. As much as six months?

A. I do not remember.

Cross-Int. 198. As much as twelve months?

A. I worked for them at different times but cannot tell just how long I staid at any time.

Cross-Int. 199. You have spoken of being at school at Lowell, then going to work, then coming back again to school; can you tell us how long this interval was between these two times of being at school?

A. I cannot.

Cross-Int. 200. Can you tell us whether it was as much as three months or six months or nine months or twelve months, or anything about it?

A. I cannot.

Cross-Int. 201. After coming back to school do you remember whether you went again to work and then back to school for the third time?

A. I believe I did.

Cross-Int. 202. Do you think you went to school more than these three times while you lived in Lowell?

A. As I have said before, I had so many changes in those years that I do not remember distinctly just how long I did work or how many times I left off to go to school.

Cross-Int. 203. I believe you have said that you left Lowell, and came to live in Boston in the year 1864; what time in 1864 was it?

A. It was in the spring or summer.

Cross-Int. 204. Do you remember where you first went to live when you came to Boston?

A. I think I boarded with Mrs. Parker, in Hayward place.

Cross-Int. 206. If you boarded after that at different times at other houses in Boston, will you, as nearly as you can, name them and the order in which you boarded in them.

A. I did not stay in Boston steadily from the time I came here in 1864 until I went to Maine in 1866; I believe I went back to Lowell and then returned to Boston; I think I changed back and forth from Boston to Lowell a number of times.

Cross-Int. 207. Can you name any other house that you ever boarded in in Boston, besides Mrs. Parker's, in Hayward place?

A. Yes, at Mrs. Wood's in Avon place.

Cross-Int, 208. Can you name any other?

A. Yes, Fernald's, 6 Hayward place.

Cross-Int. 209. Well, if there are any others please name them all.

A. That is all I remember.

Cross-Int. 210. Will you state as nearly as you can when it was that you boarded at Fernald's and when at Mrs. Wood's?

A. I think I boarded at Mrs. Wood's when I was here in 1864; as nearly as I can remember, at Mrs. Fernald's in 1865.

Cross-Int. 211. In the various times that you went to school in Lowell, did you go to the same school every time?

A. I did.

Cross-Int. 212. And as a day scholar every time?

A. I believe I have sometimes attended in the evening while at work through the day.

Cross-Int. 213. But as I understand you there were three times, and perhaps more, while you lived in Lowell and went to school, being at those times out of employment. Am I right?

(Objected to, as the witness has already answered a similar question.)

A. I really do not understand the question.

Cross-Int. 214. At how many different times or periods, as nearly as you can remember, did you attend school in Lowell as a day scholar?

A. I cannot state positively, because I do not remember.

Cross-Int. 215. What did you do with the piece of work like Exhibit 20, which you say you put on to a dress in 1862; did you keep it on and wear it?

A. I did.

Cross-Int. 216. Till it was worn out?

A. Until I had to make alterations on the dress; repair it, &c.

Cross-Int. 217. Which do you consider the best means of protecting a skirt; such a thing as Complainant's Exhibit 20, or such a thing as your patent protector?

A. Complainant's Exhibit 20 is simply a combination facing, and no protector at all; and I consider this Exhibit 23, which is to be put on over the facing and extending below the lower edge of the dress, a perfect protector.

Cross-Int. 218. What did you put on and wear this thing, like Exhibit 20, in 1862 for, when you had already a perfect protector of your own invention, as you say?

A. Simply to stiffen the bottom of the skirt and improve the hanging of it.

Cross-Int. 219. What did you use waterproof for that purpose for?

A. The fact that it was waterproof was of no advantage to me. I used it on a house dress, and used it because it was stiffer and had more body than ordinary cambric with which dresses are usually faced.

Cross-Int. 220. Was this waterproof put on entirely around the bottom of the skirt.

A. It was.

Cross-Int. 221. Did you buy it in a strip, or did you buy it in a piece, and cut it in a strip?

A. I bought it by the yard, and cut it to fit my dress.

Cross-Int. 222. In the condition in which you bought it, was it of the width which you required or not?

A. I say that I bought it by the yard. I mean by that the full width of the web. I did not buy it in strips at all.

Cross-Int. 223. Do you remember where you bought it?

A. Yes, sir; I bought it, I think, on Milk street in Boston. I do not remember the name of the firm.

Cross-Int. 224. Will you look at the dress-skirt now shown to you, marked Defendants' Exhibit —, being a green cambric skirt, having attached to it part of the way around a strip of plaited wiggan with plaited waterproof border, the border coming, as you will see, just down to and not extending below the edge of the skirt, and say whether that plaited wiggan with waterproof border so attached is a skirt protector or not, as you use that term in your patent?

A. In the way it is put on it is certainly not a skirt protector?

Cross-Int. 225. Give all the reasons why it is not.

A. Because it does not go below the lower edge of the dress.

Cross-Int. 226. Any other reason?

A. No, sir; I think that is all there is. I should like to know if the maker of this exhibit intended to represent by this a regulation gored skirt; if so, it does not resemble one in the least; the front breadth is not properly cut; there ought to be two gores on each side, and there are but one on each side, and these are wrong side, too; besides, there is no facing on the skirt, while all gored skirts (regularly) have facings cut to fit the gores and bound in with a braid.

Cross-Int. 227. I haven't the least idea whether this exhibit is intended or not to represent a regulation gored skirt. Is a skirt protector, as you used the term in your patent, not a skirt protector unless it is put on to a regulation gored skirt?

A. A skirt protector, in order to be a protection, should come below the edge of the skirt; if put up inside of the skirt it is nothing; it certainly cannot be made to serve as a facing. This Exhibit —, green in color, has no facing, and in order to make it represent a gored walking-skirt of the present fashion, it should have a deep facing of cambric, also an inner facing of hair-cloth or wiggan fitted to the skirt and bound in with the braid.

Cross-Int. 228. If "a skirt protector having a fluted or plaited border bound with or composed of enameled cloth or other waterproof material" be attached to a skirt that is not gored, will it be your skirt protector or not?

(Objected to as wholly incomprehensible in not being stated whether it is to come below the lower edge of the skirt or not.)

A. If put on so as to come below the lower edge of the skirt and between the braid and sidewalk it would be my skirt protector whether plaited or fluted, or not.

Cross-Int. 229. Are you able to say how much it must come below the braid to be your protector?

A. I do not limit myself to any particular length.

Cross-Int. 230. Early in the cross-examination, observing that you had in your hands some cards with writing on them which you appeared at times to consult before giving your answers, I asked you what they were, and you answered that they had nothing to do with this case and offered them for inspection by

the Commissioner, and at that time expressed a strong desire that they should be put into the case, which desire you have once repeated since; as it may not be convenient to you or to us that they be made an exhibit in the case, I suggest to you that you state now what those cards do have upon them, if you wish to do so?

(Objected to as the counsel fully understands it, it having been explained to him that they have nothing whatever to do with this case. The only possible purpose in putting such a question must be to hurt the feelings of the complainant or to encumber the record with inappropriate and useless questions. The counsel may as well ask for unlimited quotations from the Bible; they would have the same relevancy as the question he asks.)

A. The reason that I requested those cards to be put upon the record was, that Mr. Browne hurt my feelings severely when he tried to pull them out of my hand; also when he took advantage of my position to ask me what they were after I had told him that they had nothing to do with this case. He is very much mistaken about my consulting them before giving an answer. If he wishes to know what they are now he can see them.

Cross-Int. 231. Do you mean to swear that you have not repeatedly consulted these cards after hearing the question and before giving your answer?

(Last objection repeated.)

A. I mean to swear that I have not consulted these cards for anything.

Cross-Int. 232. Do you mean to deny upon oath that you have at any time after hearing a question put, and before giving your answer, looked at the writing upon any of these cards that I speak of; please answer yes or no, if you can?

(Last objection repeated, and further objection made that as they have been offered to the counsel to see for himself that they refer to nothing connected with this case in any manner or form, the question becomes irrelevant and impertinent, and the witness is now advised by her counsel to decline to answer any question relating to that subject matter.)

A. The writing on these cards is simply favorite verses from Scripture which I have looked at to sustain me through this trial; I have not looked at them to consult them, but rather to gain strength that I could bear up under this terrible injustice that is being done me.

Cross-Int. 233. Have you derived no other assistance from your occasional reading of these cards during this examination than that which you have just stated?

(The witness is requested to say that she declines to answer that question by advice of counsel until the Court shall further order.)

A. After explaining fully what the cards are, and why I have

them, I think I must respectfully decline to answer any further interrogatories on that subject.

Cross Int. 234. Is Complainant's Exhibit 4 cut on a bias?

A. It is not.

Cross-Int. 235. It is cut straight, is it not?

A. It is.

Cross-Int. 236. In your answer to cross-interrogatory 229 you say, "I do not limit myself to any particular length;" what do you mean by "length"?

A. I mean the length that the edge of the protector is to extend below the dress.

DIRECT-EXAMINATION resumed:

Int. 237. What was George J. Carney's business, whom you speak of as having assisted you in getting your patent?

A. Mr. George J. Carney is Treasurer of the Lowell Institution for Savings.

Int. 238. Had he any experience at all, to your knowledge, in patents?

A. He is not a lawyer nor a patent solicitor, and I do not know that he ever had any experience in patent business before.

Int. 239. State how you applied Complainant's Exhibit 20 in 1862, as you say, and why it is cut circular?

A. I applied it as a facing to a dress that was lined throughout and not gored; the three back breadths were dropped down and rounded at the bottom, therefore the facing had to be rounded, in order to fit the dress.

Int. 240. Can you state about the time when you used Exhibit 20, as you have said, in 1862 (with reference to which term of McCoy's school), that you say you attended in Lowell; was it the first term, or what term?

(After a pause.)

A. I made this dress with facing like Exhibit 20 during the first term I attended McCoy's school, which was in the first part of the year 1862.

Int. 241. Do you remember where you purchased the dress material to which you attached Complainant's Exhibit 20?

A. I bought the dress goods at Bickerton's, in Baltimore.

Int. 242. And did you make up the goods into a dress soon after you came from Baltimore to Lowell, and attach the facing like Complainant's Exhibit 20?

A. I did within a few months after I came to Lowell.

Int. 243. You have said on cross-examination that Houlton was your birthplace; do you desire to change that statement, and if so, how?

A. I should have said Hodgden, Maine; but Houlton being our post-office address, and Hodgden being an obscure town which very few people know of, I made the mistake.

Int. 244. Do you remember any one time between 1861 and 1866 when you had money enough, over and above your necessary expenses of living, to take out a patent?

A. I do not.

Int. 245. If I understand you, short dresses were in fashion in 1866, and there was no use for dress protectors again until 1872; am I right?

A. You are right.

Int. 246. Did you always intend to take out a patent for your dress protector when you had the means, and there was any use for it?

(Objected to for matter of form, and as incompetent.)

(Question withdrawn.)

Int. 247. State whether or not you had any intention to take out a patent for your dress protector when able to do so (as having the means I mean)?

(Objection repeated.)

A. It was always my intention to make application for a patent when I got able, and when such a thing was needed in the market.

Int. 248. Hear the 199th and 200th cross-interrogatories read again, and see if you can recollect about how long the intervals of time were between your school terms inquired of in these interrogatories?

(Objected to as not open on direct examination.)

A. As I have said many times before, it is impossible for me to state the exact length of time that I worked or that I attended school; I went to school as often as I could and as long as my money would hold out. In the meantime I was obliged to go to work very often between these times, but I do not think that I worked for twelve months steady at any one time.

Int. 249. You have been asked by the respondents, with regard to Respondents' Exhibit—(green cambric skirt), and its attachments; state more fully, if you can, why this piece of wiggan with an india-rubber border does not serve as a protector.

A. This piece of wiggan with an india-rubber binding does not serve as a protector because it does not go below the lower edge of the dress; therefore the braid or lower edge of the dress is not protected, and would soak up dirt and moisture and would wear out soon.

Int. 250. Supposing that there were trimmings on the bottom of the skirt, how would that piece of wiggan, bound with india-rubber as shown on that Exhibit—, last referred to, operate?

A. As it is put on now it amounts to nothing; it does not protect the dress, and of course would not protect the trimmings if there were any on the skirt.

Int. 251. The question has been asked, "if a strip of waterproof cloth were cut bias and bound over the edge of the skirt inside and outside, extending up on each side as much as two or three inches from the lower edge of the skirt," whether or not that would be a protector in the sense of your patent; please state as to this.

(Objected to as not open in re-direct, no such question having been asked the witness, and for form.)

A. The usefulness and beauty of such an invention could only

be conceived of in the mind of a man; but if such a thing were practicable and should be applied to a skirt it would not protect the trimmings; for that reason it would not be a skirt protector.

HELEN MARIE MACDONALD.

It is agreed that the complainant in suit, H. M. Macdonald *v.* S. M. Blackmer *et al.* may put in evidence the patent of Albert A. Mandell, assigned to himself and S. M. Blackmer, "Improvement in Skirt Protectors," of date May 19, 1874, No. 151,039, marked Complainant's Exhibit 24, J. F. Clark, Special Examiner, and also a bill rendered by James M. McCoy to said Macdonald for tuition, &c., in said McCoy's school, at Lowell, of date March 25, 1862, marked Complainant's Exhibit No. 25, J. F. Clark, Special Examiner.

BROWN & HOLMES,
for Defendants.

COMPLAINANT'S EXHIBIT No. 24.—J. F. Clark, Special Examiner.

UNITED STATES PATENT OFFICE.

ALBERT A. MANDELL, OF HYDE PARK, MASSACHUSETTS, ASSIGNOR TO HIMSELF AND SETH M. BLACKMER, OF SAME PLACE.

IMPROVEMENT IN SKIRT PROTECTORS.

Specification forming part of Letters Patent No. 151,039, *dated May* 19, 1874; *application filed November* 26, 1873.

To all whom it may concern.

Be it known that I, Albert A. Mandell, of Hyde Park, in the County of Norfolk and State of Massachusetts, have invented a new and useful lady's dress protector; and do hereby declare the same to be fully described in the following specification and represented in the accompanying drawings, of which—

Figure 1 is a front view, fig. 2 an end view, and fig. 3 a bottom view of the article.

It is to be secured to the lower part of the skirt of a dress, which is to lap upon the box plaits, and extend nearly, if not quite, down to their lower ends.

In the drawings, A denotes a strip or band of stiff cloth, united at its upper edge to another strip, B, box plaited, as shown. Before being box plaited the strip B is folded near its lower edge, and the fold is to be stitched through the plaits, as represented at *a*, so as to confine it and them in place and cause the plaits to bend or stand out with respect to one another, in manner as shown in fig. 3. The lower edge of the inner band A is bound with a waterproof binding, C, arranged in the band and with respect to the lower ends of the plaits, all in manner as represented. The binding projects about a third of an inch below the box plaits.

When the protector is in use it is intended for the waterproof binding to touch, or nearly touch, the pavement or ground. As the dress may be dragged along, the waterproof binding will protect the strips from absorbing water, and the box plaits, by keeping the skirt out of contact with the binding, will operate to prevent the skirt from being wet by any water which may gather thereon.

I claim—

As a new article of manufacture, the skirt protector composed of the strip A, the waterproof binding C and the box-plaited strip B, combined and arranged in the manner and for the purpose as specified and represented.

ALBERT A. MANDELL.

Witnesses,
R. H. EDDY,
J. R. SNOW.

COMPLAINANT'S EXHIBIT No. 25.—J. F. Clark, Special Examiner.

LOWELL, March 25, 1862.

Miss MARIA MACDONALD,

To JAS. M. McCOY, Dr.

To tuition in single entry in full	$3 00
" " one-half time, one month, in arithmetic	1 00
" Two blanks, @ 17c.	0 34
	$4 34
CR.	
By Cash	1 30
Due J. M. M.	$3 04
April 2—by cash	1 04
	$2 00

Received payment.

EVIDENCE FOR DEFENDANTS IN REPLY.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES IN EQUITY, AS AMENDED,

BEFORE ME,

N. AUSTIN PARKS, Special Examiner.

AUGUST 9, 1875.

Present—JABEZ S. HOLMES, Esq., of Counsel for Defendants.
GEORGE E. BETTON, Esq., of Counsel for Complainant.

DEPOSITION OF JANE M. KITTREDGE, recalled.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq.

Int. 1. Have you been previously examined in this case?

A. I have.

Int. 2. Were you ever in business with Mrs. John B. Thompson, in Avon place, Boston; if so, what was the business arrangement between you and Mrs. Thompson?

A. I said to Mrs Thompson that I was to have twenty-five dollars a week and half the profits of the business, and this was agreed to by her. The business, as long as I was with her, was carried on upon that basis. We went into Avon place for three weeks, until our rooms on Tremont street were finished, when we moved into them; and I was with Mrs. Thompson in business for a year, including the three weeks on Avon place. There were no profits at the end of the year, and I did not receive any profits, of course. Mrs. Thompson had no customers when I went into business with her; I brought the custom, and it was agreed that I should draw twenty-five dollars a week to support me, and that at the end of the year whatever profits there might be, should be divided; as there were no profits, of course, I didn't receive any, and in fact I never received the full amount of the twenty-five dollars a week.

There were two signs on the outside of the house on Tremont street, and my maiden name, Carroll, was on one of them without my knowledge. Mrs. Thompson told me that she put my maiden name on this sign, as she thought I would be better known by that name; but at the door I had a sign marked "Mrs. J. M. Kittredge, formerly J. M. Carroll," which sign I have now, the very identical sign.

CROSS-EXAMINATION by George E. Betton, Esq.

Cross-Int. 3. Was there any agreement in writing between you and Mrs. Thompson about said partnership?

A. No.

Cross-Int. 4. What were the terms of the agreement; what were you to put in, and what was she to put in?

A. I put in nothing but my labor and customers, besides cutting boards and such things, to help furnish the rooms; she put in the same.

Cross-Int. 5. Had you been in business for yourself before this?

A. I had.

Cross-Int. 6. Where, and with whom?

A. In Avon place and Tremont street. I was by myself on Avon place, and with Miss Hardy on Tremont street.

Cross-Int. 7. When was this?

A. It was before I was with Mrs. Thompson; I can't tell you in what year.

Cross-Int. 8. What year did you go into business with Mrs. Thompson?

A. I can't tell you the year.

Cross-Int. 9. What was to be the firm's name by this agreement for copartnership?

A. No firm's name.

Cross-Int. 10. Who was to furnish the goods or stock?

A. No goods furnished; the customers furnished their own goods.

Cross-Int. 11. How long did you stay in Avon place?

A. About three weeks with Mrs. Thompson, and a year for myself.

Cross-Int. 12. How long were you with Miss Hardy?

A. From February to July; I don't remember the date.

Cross-Int. 13. What house was this in Avon place in which you were yourself?

A. The last house on the right-hand side in the place.

Cross-Int. 14. Was your business there dress-making?

A. Yes.

Cross-Int. 15. What house did you occupy when you were with Mrs. Thompson on Avon place?

A. I can't say certain, but I think nineteen.

Cross-Int. 16. 'Twas not the same house, then, that you occupied in Avon place when alone in business?

A. No.

Cross-Int. 17. Is Miss Hardy now married, and is her name Mrs. Bailey?

A. I don't know.

Cross-Int. 18. Had Mrs. Thompson been in business for herself before this?

A. I never knew she was.

Cross Int. 19. How many employees were there at Mrs. Thompson's while you were there?

A. From six to sixteen was the most we ever had.

Cross-Int. 20. How much were they paid each week; from what sum to what sum?

A. From six to twelve dollars a week.

Cross Int. 21. Was twelve dollars the highest paid?

A. 'Twas the highest that was paid.

Cross-Int. 22. Were they always paid at the end of the week?

A. No.

Cross-Int. 23. When, then?

A. Whenever the money came in.

Cross-Int. 24. How long were they delayed payment?

A. Three, four and five weeks at a time.

Cross-Int. 25. You say you were paid twenty-five dollars per week; were you paid every week, or delayed, how long?

A. Never paid every week; different times, paid when the money came in.

Cross-Int. 26. How much was Mrs. Thompson to be paid by this agreement?

A. She was to draw out the same.

Cross-Int. 27. Were you to suffer any loss with her in proportion?

A. Yes.

Cross-Int. 28. When you received payment, twenty-five dollars per week, did you give receipts for the same as for wages?

A. Just set it down on our book what I received.

Cross-Int. 29. Did you set it down, or Mrs. Thompson?

A. Both of us.

Cross-Int. 30. Was there a firm's book of account kept?

A. No.

Cross-Int. 31. How were bills made out?

A. Bills were made out by Mrs. Thompson, sometimes by myself. I think I always receipted them.

Cross-Int. 32. Were the bills made out in the name of any firm?

A. No; chiefly to me.

Cross-Int. 33. Were bills for Mrs. Thompson's customers made out to you?

A. No.

Cross-Int. 34. You say you were in partnership; why were bills not made out in the name of the firm?

A. Because we had no writings drawn, and we worked together; we went in that way. I mean by that way, that when one of my customers came in and paid, it went into the drawer, and all the accounts were kept in one book.

Cross-Int. 35. In answer to 32d cross, you say, and please hear the 32d cross read: "Were the bills made out in the name of any firm? Answer, "No; chiefly to me." In view of your last answer, what do you mean by that?

A. I had more customers than Mrs. Thompson. She had very few. The rent was paid, the girls was paid, and I had my living out of it, but no profits; and Mrs. Thompson had the same. We each drew twenty-five dollars a week to support us.

Cross-Int. 36. That twenty-five dollars was use for your support; did Mrs. Thompson or you get it every week?

A. No; we *were* to draw twenty-five dollars a week.

Cross-Int. 37. When you got through was there any profits or loss, and how much?

A. There was not any profits; I couldn't tell you.

Cross-Int. 38. Was there any loss?

A. Yes.

Cross-Int. 39. How much?

A. Can't say.

Cross-Int. 40. Wasn't the books balanced?

A. No, never.

Cross-Int. 41. Was there any difficulty between you and Mrs. Thompson when you left?

A. Yes.

Cross-Int. 42. What was it?

A. Concerning the money matters.

Cross-Int. 43. Did she charge you with receiving money not accounted for by you?

A. No.

Cross-Int. 44. What did she charge you with concerning money matters?

A. She didn't charge me with anything; I charged her with it.

Cross-Int. 45. What did you charge her with?

A. I don't wish to say anything about it.

Cross-Int. 46. Where are the firm's books of account?

A. Some of them burnt, and some Mrs. Thompson has, I suppose.

Cross-Int. 47. Was you known there at Mrs. Thompson's as Miss Carroll?

A. As Miss Carroll, and Mrs. Kittridge, too.

Cross-Int. 48. Were your bills made out in your name of Carroll or Kittridge?

A. Carroll, chiefly, part of them Kittridge.

DIRECT-EXAMINATION resumed:

Int. 49. Please state whether or not you have, since your marriage, done business under your maiden name of Carroll, and why?

A. Because my customers knew me by that name better than my other, and I had customers under that name; I mean my maiden name, Carroll.

Int. 50. Were you married while you were at Coverley's?

A. No, sir; after that; I have been married nine years the 17th of this month.

Int. 51. In your answer to 2d direct, you are recorded as saying; "Mrs. Thompson had no customers when I went into business with her," &c.; will you please explain, if you desire, what you meant?

A. She had only one or two customers; afterwards her friends came to her with work; I refer to the time we first went together.

CROSS-EXAMINATION resumed:

Cross-Int. 52. How many did you have when you first went with her?

A. I had forty.

Cross-Int. 53. And yet you say that you were to divide profits and losses under those circumstances; was that so?

A. It was.

J. M. KITTREDGE.

Attest: N. AUSTIN PARKS,
Special Examiner.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

OCTOBER T., A. D. 1875.
To wit, APRIL 4, 1876.

HELEN M. MACDONALD

vs.

S. M. BLACKMER ET AL.

OPINION OF THE COURT.

SHEPLEY, *J.*—Since the disclaimer, which was filed before the date of the bill in this case, the claim of the complainants is limited to that only which was described in the specification of her patent, viz.: "As a new article of manufacture, a skirt protector, having a fluted or plaited border bound with, or composed of enameled cloth or other waterproof material." I see no reason to doubt that she was the first and original inventor of this article, as distinguished from a skirt facing, which is an entirely different article; and from a skirt protector which, being made of wiggan or similar material, was substantially useless for the purpose, as compared with the complainant's invention.

Decree for injunction and account as prayed for in the bill.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

No. 485.

HELEN MARIE MACDONALD

v.

S. M. BLACKMER ET AL.

ORDER OF COURT.

[APRIL 13, 1877.]

This cause came on to be heard at this present term upon a petition for rehearing, filed July 3, 1876, by the defendants,

and was argued by counsel for the respective parties, and now upon consideration thereof, to wit: April 13, 1877, it is ordered that the defendants, upon payment of the costs of complainant to this date, have leave to file a supplemental answer herein.

By the Court,

JOHN G. STETSON,
Clerk.

MEMORANDUM.—Defendants pay into Court the amount taxed as costs for complainant to April 13, 1877.—J. G. S., Clerk.

SUPPLEMENTAL ANSWER.

[FILED DEC. 20, 1877, AS ON NOV. 19, 1877, BY CONSENT.]

The supplemental answer of S. M. Blackmer and Albert A. Mandell, defendants, to the bill of complaint of Helen M. Macdonald, complainant.

These defendants by leave of Court, for supplemental answer to the bill of complaint in said cause, say :—

That they deny that the complainant was the original or first inventor of the Improvement in Dress Protectors described and claimed in the Letters Patent of the United States, dated Sept. 29, 1874, in said bill mentioned, and on the contrary aver that the said improvement, or a substantial and material part thereof, claimed in said Letters Patent as new, was before the date of the complainant's alleged invention thereof, described and shown in Letters Patent of the United States, granted to T. B. De Forest, for Improvement in Bindings for Skirt, dated Jan. 15, 1867.

Wherefore, the said defendants submit that the complainant is not entitled to the relief in said bill prayed, and pray to be hence dismissed with their costs.

SETH M. BLACKMER,
ALBERT A. MANDELL.

UNITED STATES OF AMERICA.

STATE AND DISTRICT OF MASSACHUSETTS, County of Suffolk, } ss.:

At Boston, in said district, this nineteenth day of November, A. D. 1877, personally appeared the above-named Seth M. Blackmer and Albert A. Mandell, and made oath that the matters and things stated in the foregoing answer, by them subscribed, are true.

Before me,

[SEAL.]

J. HENRY TAYLOR,
Notary Public.

ADDITIONAL EVIDENCE FOR DEFENDANTS.

TAKEN IN PURSUANCE OF THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED, BEFORE ME,

J. HENRY TAYLOR,
Examiner.

BOSTON, 11 A. M., Dec. 6, 1877.

Present—Miss HELEN M. MACDONALD, *pro se*.

JABEZ S. HOLMES, Esq., of Counsel for Defendants.

Defendants' counsel offers in evidence certified copy of Letters Patent to Thomas B. De Forest, No. 61,172, dated Jan. 15, 1867, for Improvement in Bindings for Skirts, and the same is marked "Defendants' Exhibit De Forest Patent, J. H. T., Examiner."

DEPOSITION OF J. C. YOUNG.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq., of Counsel for Defendants:

Int. 1. Please state your name, age, residence, and occupation.

Ans. J. C. Young; age 39; reside at 5 Rollins street, Boston; am commission merchant, by occupation dealing in small ware merchandise; I sell buttons and dress protectors; I have been engaged in dealing in these goods about twenty-five years.

Int. 2. During that time have you had occasion to make yourself familiar with the articles sold and known as dress protectors and bindings?

Ans. I have.

Int. 3. Have you examined the Letters Patent granted to H. M. Macdonald, No. 155,554, dated Sept. 29, 1874, for Improvement in Dress Protectors, printed on pages 9 and 10 of the record, and do you understand the same and the construction and operation of the article therein described?

(Objected to, as he is not an expert in patents.)

Ans. I have examined the patent and understand the use of the goods, and I understand the construction of the goods.

Int. 4. Have you examined Defendants' Exhibit De Forest Patent, being Letters Patent No. 61,172, for Improvement in Bindings for Skirts, dated January 15, 1867, and do you understand the same and the construction and operation of the article therein described?

Ans. I have examined the patent; I understand the same and the construction of the article therein described.

Int. 5. Please state whether the article therein described is, in your opinion, substantially the same as or substantially different from the article described in the Macdonald patent, and give the reasons for your opinion.

Ans. I understand that the De Forest patent describes a ribbon or a binding, vulcanized or otherwise, either bound by a narrow strip of waterproof material or having attached to one edge of

the ribbons or binding by stitching, vulcanization or cementing in any way, a narrow piece of rubber or other waterproof material; I understand the Macdonald patent to describe a strip of fabric bound with a narrow strip of waterproof material, and afterwards the same to be plaited; I, therefore, give it as my opinion that in order to manufacture the article described in the Macdonald patent it becomes necessary to take the article described in the De Forest patent and plait it; the difference is that the Macdonald patent describes a plaited article and the De Forest patent does not describe a plaited article; understand that I use the term "plaited" in its mercantile sense.

Int. 6. Are you familiar with the article sold as the Macdonald dress protector?

Ans. I have seen and examined the article.

CROSS-EXAMINATION by Miss Helen M. Macdonald:

Cross.Int. 7. What do you mean by skirt binding?

Ans. The meaning of skirt binding, as I understand it, is a narrow strip of material, braid or whatever it may be, which binds the lower edge of the skirt.

Cross-Int. 8. What is an "ordinary" binding?

Ans. What do you mean by "an ordinary binding"? What is usually sold and has been for the last twenty-five years for skirt binding is a braid made of worsted or cotton.

Cross-Int. 9. Do you deal in those articles?

Ans. I do not to-day.

Cross-Int. 10. Have you formerly sold dress bindings, with other small wares?

Ans. I have.

Cross-Int. 11. What width do those "ordinary" dress bindings come?

Ans. I have sold dress bindings a good many different widths.

Cross-Int. 12. I speak of the "ordinary" skirt bindings, such as Goff's braid, Stearns's braid, etc.; will you please tell us the width of these braids, as near as you can?

Ans. Those braids, I should say, were about half an inch.

Cross-Int. 13. Do they, or not, extend all around the bottom of the skirt?

Ans. So far as I know, they always extend clear round.

Cross-Int. 14. Have you ever seen dresses bound with any other material other than this "ordinary" material which you say is about half an inch wide?

Ans. I have never examined any dresses which were bound with any other binding. I don't know whether I have seen any dresses or not.

Cross-Int. 15. Have you ever known of any dress bindings being in the market and offered for sale other than this ordinary binding you have described?

Ans. Yes.

Cross-Int. 16. Please describe them.

Ans. For many years we sold nothing but English and German braids and bindings, and in the course of experimenting

with braids and binding I have had shown me at different times a variety of such goods. As a general way of describing them, I would call them generally braids and binding. This is the only way I could describe them.

Cross-Int. 17. In what respect do they differ from the American bindings?

Ans. Not materially.

Cross-Int. 18. How are these braids manufactured?

Ans. They are manufactured from worsted yarn generally, made on a machine called a braider.

Cross-Int. 19. Then you would not designate them "textile fabrics"?

Ans. I shouldn't, because I don't know exactly what that word covers.

Cross-Int. 20. But you have already said they were braided?

Ans. In order to be a braid they have got to be braided.

Cross-Int. 21. What is the difference between dress braid and "ordinary" binding for dresses?

Ans. What we call a dress braid, in a mercantile sense, is the ordinary bindings for the bottoms of dresses.

Cross-Int. 22. You say you are dealing in small wares, buttons, skirt protectors, etc. How long have you been in that business?

Ans. I have been in the business about twenty-five years. About eleven years as boy and clerk, and the balance of the time in jobbing and commission business.

Cross-Int. 23. Please look at the skirt protector now shown you, and marked "Complainant's Exhibit Day Protector, J. H. T., Notary Public," and state if that is the kind of goods you are selling as skirt protectors?

(Objected to as immaterial.)

Ans. That's one of the kind of dress protectors I am selling.

Cross-Int. 24. Do you sell other protectors than those made by the firm of G. Sidenberg & Co., of New York, licensed by Theodore D. Day, said to be owner of De Forest patent?

(Same objection.)

Ans. All the protectors that I am at present selling are sent to me by G. Sidenberg & Co. I know nothing about the question of licensing referred to, except by hearsay.

Cross-Int. 25. How long have you been selling skirt protectors for G. Sidenberg & Co.?

(Same objection.)

Ans. It is in the vicinity of two years, about two years.

Cross-Int. 26. Have all the skirt protectors you have sold for G. Sidenberg & Co. been substantially the same as Complainant's Exhibit Day Protector?

(Same objection.)

Ans. The majority of them have, but I have sold quite a number of different kinds.

Cross-Int. 27. Is there any difference between skirt protectors, skirt facings and skirt bindings?

Ans. There is.

Cross-Int. 28. Will you please describe the difference between them?

Ans. The difference between them is that one is a skirt protector and the other skirt facings and bindings.

Cross-Int. 29. Are they used for the same purpose in a dress?

Ans. I suppose not; skirt bindings were first generally used, to my knowledge, in this country about twenty-eight years ago to bind the bottom of dresses to protect them from wear. Skirt facings, so called, have been used sometimes for the stiffening of the bottom of the skirt and sometimes for a protection against dirt and moisture. Skirt protectors, as far as I know, are used only for the protection of the bottom of the skirt against wear, moisture and dirt.

[Complainant offers in evidence a piece of binding, and it is marked Complainant's Exhibit Goff Binding, J. H. T., Notary Public.]

Cross-Int. 30. Is this exhibit the binding you refer to as having been used for twenty-eight years?

Ans. It belongs to the same class of goods.

Cross-Int. 31. Do the skirt protectors you speak of extend all around the bottom of the dress?

Ans. No; I never saw any that did, if you mean, technically, dress protectors.

Cross-Int. 32. What portion of the dress do they protect from wear, moisture and dirt?

Ans. That portion under which they are put, generally the bottom part of the rear portion of the skirt.

Cross-Int. 43. Do you mean the lower edge of the back part of the dress?

Ans. Yes; and up as high as the width of the protector extends.

Cross-Int. 34. Does not a skirt protector, when properly attached to the dress, protect the braid or binding of the dress?

Ans. It undoubtedly does, if there is a braid or binding on the dress.

Cross-Int. 35. Are not all dresses, as a matter af fact, finished on the bottom with a braid or binding?

Ans. As a matter of fact, I don't know; my personal observations in that direction are limited.

Cross-Int. 36. Did you ever see a dress, when finished, that was not bound on the bottom with braid or binding?

Ans. I don't know.

Cross-Int. 37. Can Complainant's Exhibit Day Protector be used as a binding?

Ans. It might be, but I can't conceive why it should be.

Cross-Int. 38. Is it ever sold as a dress binding?

Ans. No.

Cross-Int. 39. Do dress bindings extend all around the bottom of a skirt?

Ans. They do, so far as I have seen.

Cross-Int. 40. Do dress facings extend all around in the same way?

Ans. I suppose, as a rule, that dress facings do; but so-called dress facings have been used at times to extend only part way round the dress, or articles sold as and called dress facings have been used in that way.

Cross Int. 41. What kind were they?

Ans. I can't at this moment describe them, as dress facings have not come under my observation for several years any way to lead me to definitely examine into the matter.

Cross-Int. 42. Have you been engaged in selling dress facings which did not extend all the way around the dress?

Ans. I don't know whether I have sold any of those or not.

Cross-Int. 43. Do you know that they were sold by others than yourself?

Ans. I have had shown me by a manufacturer those goods, and he told me that he sold the goods. I have no doubt that I can produce the goods if required.

Cross-Int. 44. Of what materials were they made?

Ans. I can't answer the question definitely at this moment.

Cross-Int. 45. Why?

Ans. From the fact that at different times there have been so many of this class of goods come under my observation that I can't tell definitely just what the material was; a great variety of materials have been used in this class of goods.

Cross-Int. 46. Were they made of water-proof materials?

Ans. I don't remember.

Cross-Int. 47. Can those articles you speak of be found at any of our leading houses?

Ans. I don't know; I haven't looked for them.

Cross-Int. 48. What manufacturer showed you those goods?

Ans. Theodore D. Day, of New York.

Cross-Int. 49. What did he call them?

Ans. Dress facings.

Cross-Int. 50. You say you have read the De Forest patent to understand it; do you understand that Figure 2 is all made of water-proof materials?

Ans. Figure 2 may be made of all water-proof materials or may not be; it may be a combination of both.

Cross-Int. 51. I did not ask you, sir, what "may be made;" I ask you if it is described in the patent as all water-proof material, you having said that you have read and understand the patent.

Ans. As described in the patent, Figure 2 may be made either way; if the two strips of binding described in Figure 2 are water-proof, being attached to a waterproof centre, the whole must be water-proof; I understand that any binding or ribbon strip used under this patent may be either water-proof or otherwise.

Cross-Int. 52. Does the patent describe a water-proof binding?

Ans. The patent says, "If preferred, the binding itself may be thinly coated with india-rubber and thus rendered water-proof."

Cross-Int. 53. What do you mean by strip?

Ans. In making of bindings, webs of cloth are sometimes

taken and cut into strips; my meaning of "strip" in this case is a part of one of those webs of cloth after it has been divided into strips.

Cross-Int. 54. Would that be an ordinary binding, such as you have described?

Ans. In a previous part of my testimony, where ordinary binding has been referred to, a worsted binding for the bottoms of dresses is what has been spoken of; in corset and skirt manufacture, a very different class of goods called bindings or tapes are used; as I understand the De Forest patent, it refers to any kind of binding or ribbon that the manufacturer thinks best to use; and from the simple fact that he claims that the same can be coated with india-rubber, it is simply absurd in any one to suppose that he refers to what we have, in the previous part of the testimony, called dress bindings, from the fact that a worsted braid or binding is in its nature loose and open; and, in order to coat with india-rubber—to make water-proof—a closer and more firmly woven fabric would naturally be used.

Cross-Int. 55. Would these closer and more firmly woven fabrics be called "ordinary" dress bindings?

Ans. No, I shouldn't suppose they would; but they might be called ordinary bindings by any party who was in the business where they were ordinarily used.

Cross-Int. 56. During your twenty-five years of experience in this business, have you ever seen articles as described in this De Forest patent made of ordinary binding such as braid, braided on a braiding machine, or two pieces of braid vulcanized to a piece of rubber binding as in Figure 2, and offered for sale in the market?

Ans. I never have.

Cross-Int. 57. Please look at skirt protector now shown you, and marked "Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public," and state what the difference is between that and Figure 2 on the De Forest patent.

Ans. This so-called Macdonald protector exhibit is made of a water-proof ribbon with a thick piece of water-proof material attached to the edge on one side; and, by putting another piece of ribbon or strip on the other side of that thick edge, you would have Figure 2 of the De Forest patent as well as I can describe it by the exhibit offered.

Cross Int. 58. Then you call this Complainant's Exhibit Macdonald Protector an "ordinary" binding, such as Complainant's Exhibit Goff Binding?

Ans. I haven't called it anything of the kind.

[ADJOURNED.]

DEC. 7, 1877, 3 P.M.

Cross-Int. 59. Then what do you call it?

Ans. I call that exhibit a dress protector.

Cross-Int. 60. Is it, in your opinion, substantially different from Complainant's Exhibit Goff Binding, and used for a different purpose?

Ans. The Exhibit Goff Binding is used to protect the bottom of a dress from wear, by being folded over and stitched on to the bottom of the dress; the dress protector (Complainant's Exhibit Macdonald Protector) is used to protect the bottom of the dress from wear, dirt and moisture, by being attached to the dress in such manner that the protector itself will be under the bottom of the dress when worn, preventing the bottom of the dress from coming in contact with the floor or ground; my opinion is that there is a substantial difference in the two articles, although both to a certain extent accomplish the same result, but not in every respect.

Cross-Int 61. Would not the Complainant's Exhibit Macdonald Protector also protect the braid or binding on the lower edge of the dress?

Ans. It undoubtedly would.

DIRECT-EXAMINATION resumed:

Int. 62. What do you understand by the term "ribbon," used in the De Forest patent?

Ans. The term "ribbon," as used in this patent, undoubtedly refers to any strip of any kind of fabric that the manufacturer sees fit to use; for instance, in our business, sometimes we take a wide web of velvet and cut it up into narrow strips of perhaps twenty different widths, and we call those strips velvet ribbons; the same is done with a web of cotton cloth, and those strips we call bindings; there can be no question in the mind of any man familiar with this class of manufacturing, that this is the sense in which Mr. De Forest uses the word "ribbon"; and the word "binding," as it occurs in this patent, is undoubtedly used with the same meaning.

Int. 63. Please look at your answer to the fifty-seventh cross-interrogatory, and explain more fully what you there mean?

Ans. In order to make Figure 2, of the De Forest patent, I would take Complainant's Exhibit Macdondald Protector, cut from the ribbon the lower or thick edge; then I would take two narrow strips, the same as the ribbon used in the above exhibit, and attach them to the thick edge, one on each side, with the vulcanized side of the ribbon out, allowing the thick edge to project somewhat below the edge of the ribbon.

CROSS-EXAMINATION resumed:

Cross-Int. 64. Why do you call Complainant's Exhibit Macdonald Protector a ribbon?

Ans. I call the thin portion of the exhibit, when detached from the lower thick edge, a ribbon: when the combination with the thick edge, it becomes a protector; my reason for doing this is that I may use the same terms in the same sense that the patentee (De Forest) uses them, so that there may be no misinterpretation of the patentee's meaning; and I also find that "ribbon" best describes the strip.

Cross-Int. 65. What do you mean by ribbon; I mean the article commercially called such?

Ans. Narrow strips of goods.

Cross-Int. 66. If you were dealing in millinery goods, and should ask a wholesale dealer for ribbons, and he should show you strips of cotton cloth with unfinished or raw edge, would you accept them as ribbons, and would you buy them as such?

Ans. I certainly should if that was the style of goods that was being used for the purpose for which I wanted ribbons.

Cross-Int. 67. Did you ever see a ribbon with an unfinished or raw edge?

(Objected to as immaterial and incompetent.)

Ans. I have seen them and sold thousands of dollars' worth of them.

Cross-Int. 68. For what purpose did you sell them?

(Same objection.)

Ans. Generally for dress trimmings.

Cross-Int. 69. Of what material were they made?

(Same objection.)

Ans. Those that I have in my mind now were made of part silk and part cotton.

Cross-Int. 70. Were they braided or woven?

(Same objection.)

Ans. Woven.

Cross-Int. 71. What did you call them?

Ans. Ribbons.

Cross-Int. 72. Do you deal in those articles now?

(Same objection.)

Ans. No.

Cross-Int. 73. How long since have you dealt in them?

(Same objection.)

Ans. I can't tell exactly, but I haven't dealt in them largely during the last ten years; may have sold some of those goods, can't recollect.

Cross-Int. 74. Were they plain or figured?

(Same objection.)

Ans. Generally plain, I believe.

Cross-Int. 75. Were the edges fringed or plain?

(Same objection.)

Ans. As plain as they could be, being cut.

Cross-Int. 76. Of whom did you buy those goods?

(Same objection.)

Ans. Bought them from a number of different importing houses; I recollect Shack & Hotop, formerly of New York, now out of business; I can't think of any others at this moment.

Cross-Int. 77. Were you in the commission business then?

(Same objection.)

Ans. In the jobbing business, on my own account.

Cross-Int. 78. To whom did you sell those goods, and can you name some Boston house now in existence to whom you sold them?

(Same objection.)

Ans. I don't know; I can't; I presume I can produce plenty of the goods, if you care to see them, or similar goods.

Cross-Int. 79. Will you produce a sample of these goods to be introduced as an exhibit?

(Same objection.)

Ans. I will providing the expense of doing so is paid by Miss Macdonald, or anybody else connected with the suit; I should probably have to go to New York to find the goods.

Cross Int. 80. In what house would you expect to find them there?

(Same objection.)

Ans. I don't know.

Cross-Int. 81. But you said you could produce plenty of them if I cared to see them; I do care to see them, and would like to have a sample of them introduced as an exhibit in this case, and will ask you once more if you will produce a sample?

(Same objection.)

Ans. I didn't say that I could produce them; I said I presumed I could, and I have no objection to doing the best I can to find the goods, providing I am not put to any expense about the matter.

Cross-Int. 82. Had they no other names than "ribbons."

(Same objection.)

Ans. The different kinds had different names to designate what kinds of ribbons they were.

Cross-Int. 83. How many different kinds had you?

(Same objection.)

Ans. I can't tell; my dealing in those goods covered a good many years; it is impossible for me to recollect about those kinds of goods.

Cross-Int. 84. But you have said that they were plain and had plain edges, or edges as cut from the web; were they all as you describe them here?

(Same objection.)

Ans. All the kinds described were as I have described them; no doubt ribbons are made with fast edges.

Cross-Int. 85. You mean by that, that a ribbon is a thing complete in itself, with finished edges, do you?

(Same objection.)

Ans. I haven't said anything of the kind; what I do mean is, that a ribbon may be narrow strip of fabric with a fast, woven edge, or it may just as properly be a narrow strip of fabric which has been cut from a wide web of fabric, and that this fact is so patent to anybody who knows anything about ribbons that this question seems to me absurd.

Cross-Int. 86. In answer to the sixty-second interrogatory you have said that we sometimes take a wide web of velvet and cut it up into strips of twenty different widths; do you cut them straight or bias?

(Same objection.)

Ans. I used the word "we" there simply to designate the general class of trade with which I have been associated; I really never thought anything about whether they were straight or bias. Should suppose that if you wanted to get a long strip out

of a narrow web of cloth, you would cut them straight, and if you wanted to get a short strip bias, you would cut it bias.

Cross-Int. 87. But in either case you would call them and sell them as "ribbons," do you?

(Same objection.)

Ans. I certainly should if I put them up as ribbons. If I wanted to use them as bindings, I should call them bindings. In order to make this perfectly plain, allow me to refer to an article made in the vicinity of Boston,—I haven't the name of the manufacturer in my mind at this moment,—cut from a web of cotton cloth, put up and sold as corset bindings; also to an article sold, I think, by a house in New York (Seligman & Bondy), some six years ago, cut from a web of cotton velvet or velveteen, and put upon the market as cotton velvet ribbons.

Cross-Int. 88. What is the difference between those and the article known in the trade as velvet ribbon?

(Same objection.)

Ans. These made by Seligman & Bondy were cotton velvet ribbons with a raw edge, and if they had a fast edge they would have been cotton velvet ribbons with a fast edge. The fast edge ribbons, as I understand, are woven in a separate strip just the width they are put up and the raw edge ribbons are produced by cutting up a wide web into narrow strips.

Cross-Int. 89. Are those raw edge ribbons, as you call them, common in the market at the present time?

(Same objection.)

Ans. I don't know anything about the ribbon market at the present time. They were very common when I was in the jobbing trade.

Cross-Int. 90. If you should go into a dry goods house to buy velvet ribbon, would it be necessary for you to say you wanted velvet ribbon, with woven edge, to make them understand what you wanted?

(Same objection.)

Ans. I don't know anything about the custom at the present time. When I was in the jobbing trade, if I wanted raw edge ribbons, I called for them, and the same if I wanted woven edge.

J. C. YOUNG.

Attest:

J. HENRY TAYLOR,
Special Examiner.

DEFENDANTS' EXHIBIT DE FOREST PATENT, J. H. T., Examiner.

LETTERS PATENT OF THE UNITED STATES, NO. 61,172.

GRANTED THOMAS B. DE FOREST, JANUARY 15, 1867.

IMPROVEMENT IN BINDINGS FOR SKIRTS.

SPECIFICATION.

CASE B.

To all whom it may concern:

Be it known that I, T. B. De Forest, of Birmingham, in the county of New Haven and State of Connecticut, have invented a new Improved Binding for Dress-Skirts; and I do hereby declare the following, when taken in connection with the accompanying drawings, and the letters of reference marked thereon to be a full, clear and exact description of the same, and which said drawings constitute part of this specification, and represent sections of different forms of constructing the binding enlarged.

This invention relates to an improvement in the binding for the skirts of ladies' dresses; and consists in the formation of a binding which shall present an edge of India rubber or other flexible material below the edge of the skirt to protect the same from wear by contact with the floor or pavement.

To enable others to construct and use my improvement I will proceed to describe the same as illustrated in the accompanying drawings.

The manner in which I prefer to form the binding is by the attachment of the gum to a ribbon or strip of ordinary binding and secure the two together by the process known as vulcanization. Such construction is shown in Figs. 1, 2, 3, 4, and 5, enlarged.

In Fig. 1, *a* is the binding, and *d* the rubber. The rubber is applied to the binding while in an adhesive or uncured state; or it may be cured rubber, the surface which comes in contact with the binding being coated with India rubber gum, the two being attached together, and secured by the ordinary process of vulcanization, and then the binding is stitched to the skirt in the usual manner; or, as seen in Fig. 2, two strips of binding, *a a*, are attached in like manner, the one lying upon the outside of the skirt, the other upon the inside, and in Fig. 2 a broad piece of binding is used and doubled so as to form two sides, and the doubled edged covered, as seen at *d*, Fig. 4, in like manner; or, as in Fig, 4, a round edge of rubber, *d*, may be in like manner secured to the binding *a*, or a flat piece of rubber, *d*, secured to the binding *a*, as seen in Fig. 5.

I thus far describe the rubber as attached to the binding by gum or the process of vulcanization, yet it may be done, as seen in Fig. 6, by stitching the binding *a* to the rubber *d*, as denoted at *f*.

If preferred, the binding itself may be thinly coated with India rubber, and thus rendered waterproof.

The edge of the binding thus formed prevents the binding from being worn by dragging upon the floor or pavement, and the binding is thus prepared at a comparatively small cost.

By the expression india rubber edge I do not wish to be understood as confining myself to this material, but to any kindred flexible material.

Having thus fully described my invention, what I claim as new an useful, and desire to secure by Letters Patent, is —

A binding presenting an india rubber or similar flexible edge, substantially as herein described, as a new article of manufacture.

THOS. B. DE FOREST.

Witnesses:
E. SHUSTER,
DANIEL S. LATHROP.

EVIDENCE FOR COMPLAINANT IN REPLY.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED, BEFORE ME,

H. BURR CRANDALL,
Special Examiner.

BOSTON, Jan. 5, 1878.

Present—COMPLAINANT *pro se*;

JABEZ S. HOLMES, of Counsel for Defendants.

DEPOSITION OF SUMNER R. MEAD.

DIRECT-EXAMINATION by the Complainant.

Int. 1. Please state your name, age, residence, and occupation?

Ans. Sumner R. Mead; forty-two; Boston; merchant.

Int. 2. What line of goods do you sell?

Ans. Hosiery, small wares, and trimmings.

Int. 3. How many years have you been in this business?

Ans. Twenty-eight.

Int. 4. Please look at Complainant's Exhibit Goff's Braid and state whether or not you have dealt largely in that article?

Ans. I have; I sold $37,000 worth of it last year.

Int. 5. Is it known in the market as an ordinary binding for dress skirts?

(Objected to as incompetent and immaterial.)

Ans. Yes.

Int. 6. Have you also dealt in skirt protectors?

Ans. I have.

Int. 7. Has the sale of skirt protectors in any way diminished

the sale of braids and bindings, or can they in any way take the place of braids and bindings?

(Objected to as incompetent and immaterial and for form.)

Ans. Skirt protector sales have not diminished the sale of braids, only so far as it has seemed to protect the braids; the skirt protector can never take the place of the binding.

(Complainant offers exhibit marked "Complainant's Exhibit A.—H. B. C., Special Examiner," and also exhibit marked "Complainant's Exhibit B.—H. B. C., Special Examiner.")

(Both these exhibits objected to as incompetent, Exhibit A not appearing to be the De Forest binding, and Exhibit B not appearing to be a protector covered by the complainant's patent.)

The complainant nevertheless offers them in evidence, feeling assured that the Court will see that Exhibit A is a perfect illustration of Fig. No. 2, De Forest binding as described—two strips of binding *a a* attached in like manner, the one lying upon the outside of the skirt, and the other upon the inside, and having a piece of rubber vulcanized between the edges, as he claims.

The complainant offers exhibit marked "Complainant's Exhibit Ribbons, H. B. C., Special Examiner."

(This exhibit objected to as incompetent and immaterial.)

Int. 8. Please look at complainant's exhibit marked "Exhibit A," De Forest binding, and the binding thereon, and state whether or not you have ever seen an article like this binding for sale in the market?

(Objected to as incompetent and immaterial.)

Ans. I do not remember of ever having seen anything of this article in the market.

Int. 9. Do dress braids or bindings extend all around the skirt?

(Objection repeated.)

Ans. They do, all around.

Int. 10. Do skirt protectors extend all around the skirt, or only around the back portion, as shown in complainant's exhibit marked "Macdonald Patent B," as now shown you?

(Objection repeated.)

Ans. They extend only on the back of the skirt.

Int. 11. Do they not protect the lower edge of the dress, and the braid or binding thereon?

(Objection repeated.)

Ans. They do.

Int. 12. Is there any difference between bindings and skirt protectors and the purposes for which they are used?

(Objection repeated.)

Ans. There is.

Int. 13. Please look at complainant's exhibit marked "Ribbons," and state whether or not these are samples of ribbons?

(Objection repeated.)

Ans. They are.

Int. 14. Are not ribbons always complete in themselves, hav-

ing finished edges—as those seen on gentlemen's hats—bands and bindings?

(Objection repeated.)

Ans. I don't know.

Int. 15. Did you ever see a ribbon having an unfinished or raw edge?

(Objection repeated.)

Ans. I do not remember ever having seen a ribbbon with a raw edge.

Int. 16. Please look at complainant's exhibit marked "Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public," and state whether or not that is a ribbon?

(Objection repeated.)

Ans. It is not.

SUMNER R. MEAD.

Attest:

H. BURR CRANDALL,
Special Examiner.

DEPOSITION OF T. W. RICH.

January 5, 1878.

DIRECT-EXAMINATION by Complainant:

Int. 1. State your residence and occupation?

Ans. Residence, Chelsea, Mass.; and occupation jobber of small wares, in Boston.

Int. 2. How long have you been in that business?

Ans. About fifteen years.

Int. 3. During these years have you dealt largely in braids and bindings?

Ans. I have.

Int. 4. Please look at complainant's exhibit marked "Complainant's Exhibit Goff Binding," and state whether it is an ordinary binding, as used for the bottom of dresses.

(Objected to as incompetent and immaterial.)

Ans. It is.

Int. 5. Please look at complainant's exhibit marked "Complainant's Exhibit Macdonald Protector," and state whether that exhibit is a skirt protector.

(Objection repeated.)

Ans. It is.

Int. 6. Are not skirt bindings and skirt protectors separate and distinct from each other, and sold for different purposes?

(Objection repeated.)

Ans. Certainly.

Int. 7. Does not the binding extend all around the skirt?

(Objection repeated.)

Ans. Yes.

Int. 8. Does the skirt protector go all around the skirt, or only go around the back part of the skirt, as shown in complainant's

exhibit marked "Complainant's Exhibit B (Macdonald Protector Number 2)"?

(Objection repeated.)

Ans. Only around the back part of the skirt, most certainly.

Int. 9. Look at complainant's exhibit marked "De Forest's Binding A," that being a miniature representation of a trailing skirt, and state whether or not that skirt has a protector.

(Objection repeated.)

Ans. I should say it had not.

Int. 10. Please look at complainant's exhibit marked "B Macdonald Protector, No. 2," and state whether that has a protector or not.

(Objection repeated.)

Ans. It has.

Int. 11. Has it also a binding?

(Objection repeated.)

Ans. It has.

Int. 12. Does not the protector go underneath the lower edge to the lower edge of the dress and the binding thereon?

(Objection repeated.)

Ans. It does.

Int. 13. Are not all dress skirts finished on the bottom with a binding?

(Objection repeated.)

Ans. My impression is that they are.

Int. 14. Do you know how these braids are made; I mean by that, are they woven or braided?

(Objection repeated.)

Ans. I should say braided on a braiding machine, though I never saw the practical operation.

Int. 15. In that case would you call them textile fabrics? Textile means any woven fabric.

(Objection repeated.)

Ans. I should not.

Int. 16. Please look at complainant's exhibit marked "Day Protector," and state whether it can be used as an ordinary skirt binding.

(Objection repeated.)

Ans. I should say not. It could not.

Int. 17. Please look at the exhibit marked "Exhihit Day Protector," and state whether or not it is about the average length of a skirt protector.

(Objection repeated.)

Ans. I should say it was.

Int. 18. Please look at exhibit marked "Complainant's Exhibit Ribbons," and state whether or not they are fair samples of ribbons as sold at the present day.

(Objection repeated.)

Ans. They are.

CROSS-EXAMINATION *de bene* by Jabez S. Holmes, Esq., of counsel for defendants.

Cross-Int. 19. What do you mean by the term "skirt protector"?

Ans. It is an article to protect the bottom of the dress where it trails on the ground.

Cross-Int. 20. And whatever does this is a skirt protector, is it not, in your opinion?

Ans. Whatever does sufficiently protect the dress where it trails on the ground is a skirt protector.

Cross-Int. 21. What do you mean by sufficiently protecting the dress?

Ans. A piece of paper sewed on the bottom of a dress would not be a sufficient protector, nor would an ordinary piece of cloth.

Cross-Int. 22. Suppose an ordinary piece of cloth were covered with water-proof material and sewed on the bottom of a dress where it trails on the ground, would that, in your opinion, be a sufficient dress protector?

Ans. It would depend a great deal upon what the covering is, to be a sufficient protector, in my mind.

Cross-Int. 23. Supposing the ordinary piece of cloth were coated with india-rubber and sewed on to the dress where it trails on the ground, would that, in your opinion, be a sufficient skirt protector?

Ans. I should say in one sense it was; but a perfect skirt protector wants something more at the bottom of it.

Cross-Int. 24. What more is needed at the bottom for a perfect skirt protector?

Ans. A heavy edge or thickness or thicknesses.

Cross-Int. 25. What has the heavy edge or thickness to do with the protection of the skirt?

Ans. Naturally, a dress trailing, most of the wear is from the edge up, and it hangs better.

Cross-Int. 26. You mean it hangs better with the heavy edge?

Ans. Yes, sir.

Cross-Int. 27. Without regard to the hanging of the skirt, would an ordinary piece of cloth coated with india-rubber and sewed to the dress, so as to cover the skirt where it drags on the ground, be, in your opinion, a sufficient skirt protector?

(Objected to as he has already stated that a thick edge is necessary to improve the hanging of the skirt and prevent the skirt protector and dress from wearing out.)

Ans. I should say it would not.

Cross-Int. 28. Why not.

Ans. Most of the wear comes from the edge up; an ordinary piece of cloth would be about the same thickness throughout.

Cross-Int. 29. Do you mean to say that in your opinion a sufficient skirt protector must be thicker or heavier at its lower edge than anywhere else?

Ans. It ought to be; yes, sir.

Cross-Int. 30. Now, supposing a piece of ordinary cloth were coated with india-rubber and made thicker or heavier at the bottom, and sewed to a skirt so as to cover the skirt where it drags on the ground, would that, in your opinion, be a sufficient skirt protector?

Ans. It would be a skirt protector. I should want to see it before I could say about the other part, that is, the sufficiency.

Cross-Int. 31. What would you want to see?

(Objected to because he has already stated that he would want to see it before he could pronounce it a sufficient protection.)

Ans. I should want to see that edge.

Cross-Int. 32. Why?

Ans. To see whether it was a sufficient protector or not.

Cross-Int. 33. What should the edge be, to make it a sufficient protector, in your opinion?

Ans. It should be heavy, and thoroughly waterproof.

Cross-Int. 34. Now, supposing the strip of ordinary cloth were rendered thoroughly waterproof, and then sewed on to the bottom of a skirt, so as to cover that part of the skirt which drags on the ground, would that, in your opinion, be a skirt protector?

(Objected to, as he has already stated that a thick edge would be necessary to insure wear of the protector and the skirt, and improve the hanging of the skirt.)

Ans. Not a sufficient skirt protector.

Cross-Int. 35. Then a strip of waterproof material, sewed to the bottom of a skirt so as to cover the part of the skirt which drage on the ground, is not, in your opinion, a skirt protector?

(Objected to, unless he states some finish for the bottom, as it would be impracticable to sew in an ordinary piece of waterproof material having the lower edge raw and unfinished.)

Ans. Not a sufficient skirt protector.

Cros-Int. 36 You understand, do you not, that by the word "cover," used in my question, I mean coming between the dragging skirt and the ground?"

Ans. Certainly.

Cross Int. 37. How far around the bottom of a skirt must a skirt protector, as you use the term, extend?

Ans. I should say from four to five feet.

Cross-Int. 38. You mean by that, do you not, that it should cover all the dragging part of the skirt?

Ans. I do.

THOS. W. RICH.

Attest:

H. BURR CRANDALL,
Special Examiner.

Deposition of Miss Lida A. Wadleigh.

Boston, January 7, 1878.

Direct-examination by Complainant:

Int. 1. Please state your residence and occupation.

Ans. Residence, Boston; occupation, millinery or dress making.

Int. 2. Have you, in the past ten years, done more or less dress making, and do you understand the business in all its branches?

Ans. I have, and I think I understand it.

Int. 3. Will you please look at exhibit marked "Complainant's Exhibit 'B' Macdonald Protector," being a miniature skirt, black in color, and state whether or not that has a binding and a protector?

(Objected to as incompetent and immaterial.)

Ans. It has both.

Int. 4. Will you please look at said exhibit and state whether the braid or binding thereon is an ordinary binding?

(Same objection.)

Ans. It is.

Int. 5. Does not the braid or binding in all cases extend all around the skirt?

(Objection repeated.)

Ans. It does.

Int. 6. Do you understand that the meaning of binding is something to bind two or more articles together, or the facing, stiffening and dress material, and as the leaves of a book, etc.?

(Objection repeated.)

A. I do, yes.

Int. 7. Will you please look at exhibit marked "Complainant's Exhibit B, Macdonald Protector," and the india-rubber strip thereon and state what that is,—I mean the strip coated with india-rubber and having a fluted edge of the same?

(Objection repeated.)

Ans. It is a strip of water-proof material used as a protector of the dress skirt and binding.

Int. 8. Is it necessary to have a protector extend all around a skirt?

Ans. It is not.

Int. 9. Is there a difference between a skirt binding and a skirt protector?

Ans. There is.

Int. 10. Could a skirt protector possibly be made to take the place of a skirt binding?

(Objection repeated.)

Ans. It could not.

Int. 11. Please look at exhibit marked "Complainant's Exhibit A, De Forest Binding, and say what kind of a binding that is?

(Same objection.)

Ans. It is a braid or binding.

Int. 12. Is it not two strips of "ordinary binding," the one laying upon the outside and the other on the inside of the skirt, having a strip of vulcanized rubber between them?

(Same objection.)

Ans. It is.

Int. 13. Have you in your experience as a dress maker, or in buying goods for customers ever seen such a binding as that offered for sale?

(Same objection.)

A. No.

Int. 14. Have you seen any binding presenting an india-rubber or similar flexible edge,—I mean by that have you ever seen them in the stores for sale?

(Same objection.)

Ans. I never have.

Int. 15. Have you ever heard of such things before?

(Same objection.)

Ans. No.

Int. 16. If a dress skirt was bound all around like that in exhibit marked "Complainant's Exhibit A, De Forest Binding," would it not still need a protector?

(Same objection.)

Ans. It would.

Int. 17. Please look at Exhibit marked "Complainant' Exhibit Goff's Binding," and state whether or not that it is an ordinary binding?

(Same objection.)

Ans. It is.

Int. 18. Please look at exhibit marked "Complainant's Exhibit Ribbons," and state whether or not these are fair samples of ribbons.

(Same objection.)

Ans. They are.

Int. 19. Are they ever used as bindings for the bottoms of dresses?

(Same objection.)

Ans. I never used, or heard of any being used for a dress binding.

Int. 20. Will you look at exhibit marked "Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public," and state whether or not that is a ribbon.

(Same objection.)

Ans. It is quite different from a ribbon.

Int. 21. Have not all ribbons fast or finished edges, as shown in exhibit marked "Complainant's Exhibit Ribbons"?

(Same objection.)

Ans. They have.

CROSS-EXAMINATION *de bene*, by Jabez S. Holmes, Esq., of Counsel for Defendants.

Cross-Int. 22. Do you consider the protector on exhibit marked "Complainant's Exhibit B, McDonald Protector, No 2," to be a fluted or plaited protector?

Ans. I do.

Cross-Int. 23. Do you consider exhibit marked "Complainant's Exhibit, McDonald Protector, J. H. T., Notary Public," to be a fluted or plaited protector?

Ans. I do.

Cross-Int. 24. What do you understand by fluted?

Ans. It is to make the protector more flexible and the skirt hang more gracefully than it would if that were perfectly straight.

Cross-Int. 25. Do you me by "that" in your last answer the protector?

Ans. I do.

Cross-Int. 26. Do you mean the exhibit marked "Macdonald Protector, J. H. T., Notary Public"?

Ans. I do.

Cross-Int. 27. Have you given the best statement that you can of your understanding of the word "fluted," inquired for in Cross-Int. 24?

Ans. I have.

Cross-Int. 28. What do you understand by the word "plaited"?

Ans. I think I have given you that answer.

Cross-Int. 29. You have given me your understanding of the word "fluted," will you now please give your understanding of the word "plaited"?

(Objected to as immaterial.)

Ans. Fluting and plaiting is one and the same thing.

Cross-Int. 30. Then you consider Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, both fluted and plaited, do you not?

Ans. I do, fluting and plaiting are the same.

Cross-Int. 31. Do you know whether or not protectors like Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, are now sold as Macdonald protectors?

(Objected to as immaterial.)

Ans In a good many places, by many firms.

Cross Int. 32. There is a different protector also sold as the Macdonald protector, is there not?

Ans. Not known as the Macdonald protector, that I know of.

Cross-Int. 33. Do you mean to say that there is not now to your knowledge sold in market or by dealers in such articles in Boston, any skirt protector known as the Macdonald protector, in any way different from the protector Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public?

(Objected to as this lady has her own business to attend to, and cannot keep run of all the unprincipled men and Jews in New York, Philadelphia and Boston who are infringing the Macdonald patent, by putting miserable stuff on the market and calling them skirt protectors. There doubtless are many so-called skirt protectors and new ones coming up every day made by men that are not smart enough to earn their livings in any legitimate manner, therefore they seek to rob me of this invention because I am a woman, and because they think I have not the capital to protect myself with.)

Ans. I don't know of any.

Cross-Int. 34. Did you ever see a protector known as or called a Macdonald protector, differing in any way from Complainant's Exhibit Macdonald Protector, J. H. T. ?

Ans. I never have.

LIDA WADLEIGH.

Attest :

H. BURR CRANDALL,
Special Examiner.

DEPOSITION OF MRS. OLIVIA P. FLYNT.

BOSTON, Jan. 7, 1878.

DIRECT-EXAMINATION by Complainant :

Int. 1. Please state your residence and occupation.

Ans. Residence, 319 Columbus avenue, Boston; am a dress and cloak maker and manufacturer of underclothing for women and children.

Int. 2. How long have you carried on the business of dress-making ?

Ans. It is thirty-seven years this week, since I commenced the business of dress making as an apprentice.

Int. 3 Are not all street dresses finished on the bottom with bindings ?

Ans. All that I make are finished with bindings.

Int. 4. Does not the binding extend all around the skirt in all cases ?

(Objected to as incompetent and immaterial.)

Ans. It must as a finish.

Int. 5. Look at complainant's exhibit marked "Complainant's Exhibit Goff's Binding," and state whether or not that is an ordinary binding.

(Same objection.)

Ans. This is such binding as we ordinarily use as a finish for the bottoms of dresses.

Int. 6. Please look at exhibit marked "Complainant's Exhibit A, De Forest Binding," and state whether or not that has a protector.

Ans. There is no protection for the skirt or binding.

Int. 7. Please look at complainant's exhibit, marked "B. Macdonald, Protector No. 2," and state whether it has a binding.

(Same objection.)

Ans It has a binding of ordinary braid.

Int. 8. Has it also a protector ?

(Same objection.)

Ans. It has a protector for the facing and the braid.

Int. 9. It is not necessary for a protector, in order to serve as a protection, to extend up inside of the skirt enough to cover the braid and that portion of the facing that drags?

(Same objection.)

Ans. It is. The skirt of a lady's dress wears out soonest inside

the braid and an inch up on the facing on the back and a little ways on the sides.

Int. 10. Is it necessary to have the protector extend all around the skirt?

(Same objection.)

Ans. It is not, as ladies invariably wear their dresses an inch or more from the ground or floor in front.

Int. 11. Will you please look at complainant's exhibit marked "Complainant's Exhibit Ribbons," and say whether they are fair samples of ribbon?

(Same objection.)

Ans. To illustrate the term "ribbon," they are.

Int. 12. Please look at exhibit marked "Complainant's Exhibit A, De Forest Binding," being a miniature skirt, and state whether you ever saw a binding like that offered for sale in the market.

(Same ob ection.)

Ans. I never saw it anywhere until within the last half hour.

Int. 13. Have you ever heard of a binding presenting an india-rubber or similar flexible edge, like that illustrated in exhibit marked "Complainant's Exhibit A, De Forest Binding?"

(Same objection.)

Ans. Never.

CROSS-EXAMINATION, *de bene*, by Jabez S. Holmes, Esq., of counsel for defendants:

Cross-Int. 14. What do you mean by the word "protector"?

Ans. As connected with the matter in hand, with the bottom of a skirt, it is something attached to the inside of a skirt extending about an inch or a little more up from the bottom and a trifle over and beyond the braid on the inside, waterproof and not easily worn out.

Cross-Int. 15. Please explain what you mean by the expression, "a trifle over and beyond the braid on the inside," used in your last answer.

Ans. We finish the bottoms of dresses with braid, the braid presents about half an inch on the under side of the skirt. The under side comes to more wear than the outside. In having the protector placed about an inch above, and extending over and a sixteenth of an inch beyond the braid, it is not only protected from wear but dampness, that makes all braids shrink and pucker the bottom of the dress.

O. P. FLYNT.

Attest:

H. BURR CRANDALL,
Special Examiner.

DEPOSITION OF HELEN MARIE MACDONALD.

BOSTON, Jan. 15, 1878.

[Jabez S. Holmes, Esq., counsel for defendants, leanring, upon inquiry of the complainant, who now offers herself as a

witness in her own behalf, that she has not and does not propose to have counsel present to propound interrogations to her, but proposes to give her evidence in a narrative form, without interrogatories, objects to such a proceeding, and gives notice that he will move, before or at the hearing, to strike out the evidence so taken. And he asks the Examiner to decline to take the complainant's evidence in such manner and form.]

[Notwithstanding the objection of counsel for defendants, the complainant was sworn, and proceeded to depose, without being interrogated, but in a narrative form.—H. B. C., Special Examiner.]

As I am authorized to do, by the sixty-seventh Rule in Equity, which says: "The depositions taken upon such oral examination shall be taken down in writing by the Examiner, in the form of narrative, unless he determines the examination shall be by question and answer, in special instances; and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend, &c.," I now proceed to give my evidence in the form of narrative.

That T. B. De Forest obtained a patent for what he calls "improvement in skirt bindings," cannot be denied; but that that binding is a skirt protector, or any part of a skirt protector, can be, and is, most emphatically denied. Why! a skirt protector, having a fluted border, and composed of water-proof material like exhibit "Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public," is no more like the De Forest binding than a church organ is like a wheelbarrow.

Complainant's Exhibit Goff Binding, J. H. T., Notary Public, is an "ordinary binding," and is always used on the bottoms of dresses as a finish, and to bind the facing, stiffening and dress material together, and always extends all around the skirt; no dress can be finished without a binding. But the dress is finished and complete without a protector, it being at the option of the wearer to sew one in her dress if she chooses to do so. The skirt protector in all cases extends only around the back portion of the dress, and between the lower edge of the dress and pavement, and protects the skirt and the braid or binding thereon, as shown in exhibit marked "Complainant's Exhibit B, Macdonald Protector No. 2, H. B. C., Special Examiner." Mr. Day, who has bought the De Forest patent for a binding, or G. Sidenberg, who is licensed by him to manufacture skirt protectors under said patent, can make ten thousand pieces of that binding every day and sell them (provided they can find purchasers), and would not make any effort to prevent them, for my business would not be affected by such sales. But when they attempt to enlarge this *little thing*, viz., this "ordinary binding presenting an india-rubber or similarly flexible edge," and endeavor to make it cover a skirt protector, they go, I think, some distance further than the law will allow.

The De Forest patent was issued on the fifteenth day of Jan-

uary, A. D. 1867, therefore, is eleven years old to-day; and yet no person can be found who has ever seen it for sale as an article of merchandise, or who has ever heard of it before its appearance in this case. Evidently the reason why the article was not put upon the market was because it was not only frivolous and impractical, but utterly useless and absurb, as may be seen in exhibit marked "Complainant's Exhibit A, De Forest Binding, H. B. C., Special Examiner," which is a perfect illustration of Fig. 2. De Forest patent No. 61,172, Fig. 2 in said patent, is two strips of binding, *a a*, the one lying upon the outside and the other upon the inside of the skirt vulcanized to a piece of rubber, *d*, bringing the india rubber on the extreme edge of the skirt as seen in this exhibit. It has been said by the defendants that De Forest used a textile fabric for his binding. The word "textile" does not occur once in the De Forest patent, but he defines and limits the article to an ordinary binding, which is represented in exhibit marked "Complainant's Exhibit Goff Binding, J. H. T., Notary Public." The exhibit Goff Binding is braided on a braiding machine, as are all such braids and ordinary bindings, therefore they cannot be textile fabrics.

I refer to exhibit marked "Complainant's Exhibit Day Protector, S H. T., Notary Public," and aver that it is not a binding, neither "ordinary nor extraordinary," nor can it be used as such. I now submit myself to such cross-examination as the counsel for defendants may offer.

HELEN M. MACDONALD.

Attest:

H. BURR CRANDALL,
Special Examiner.

Counsel for defendants objects to the foregoing evidence of the complainant as improperly taken, not proper in form, and incompetent, as before, and gives notice that on Wednesday, January 16, at the coming in of the Court or as soon thereafter as counsel may be heard, he will move that the same be stricken from the record of this case and proceeds to cross-examine *de bene*.

H. BURR CRANDALL,
Special Examiner,

BOSTON, January 16, 1878.

The motion to strike out the deposition of complainant, taken as above, having been heard by his Honor Daniel Clark, Judge of the Court, and denied, defendants' counsel proceeded to cross-examine *de bene* as follows:

Cross-Int. 1. Is Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, a protector having a fluted or plaited border bound with or composed of enameled cloth or other waterproof material, in your opinion?

A. Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, answers the Macdonald patent, it having a fluted border and being composed of waterproof material.

Cross-Int. 2. Will you please answer my question now repeated?

A. I have already answered it to the best of my ability, that it has a fluted border and is composed of waterproof material.

Cross-Int. 3. Will you please point out the fluting on the border of that exhibit or describe it?

A. Certainly; the fluting is the channel or fluting on the india rubber border.

Cross-Int. 4. Do you mean to say that the india rubber border of this exhibit is fluted, in your opinion?

A. I do.

Cross-Int. 5. Do you consider that straight parallel marks or creases across a strip of india rubber or other material make that strip a fluted piece of india rubber or material?

A. I do.

Cross-Int. 6. Have you ever made or sold any protectors exactly like Complainant's Exhibit Macdonald protector, J. H. T., Notary Public?

A. I have had them made for me and have sold them.

Cross-Int. 7. Have you had them made and sold them as protectors, covered by your patent now in suit?

Ans. Certainly. No person would ever have bought them if I had offered them as bindings.

(All the answer after "certainly" objected to, as irresponsive and incompetent.)

Cross-Int. 8. Were these protectors that you have had so made, and have sold, marked or labeled with the date of your patent?

Ans. Yes; all of them.

Cross-Int. 9. When did you begin to sell these protectors so marked or labeled?

Ans. I made water-proof protectors before my patent issued, that is, while it was pending. These of course were marked "patent applied for." All that I have sold since the patent issued have borne the date of the patent.

(Answer objected to as not responsive.)

Cross-Int. 10. Will you please to answer my last question?

Ans. I must understand the question before I can answer it. Do you mean the very first skirt protectors that I made, which were of enameled cloth, or do you mean the late style like Complainant's Exhibit Macdonald Protector, J. H T., Notary Public, which is water-proof with India rubber.

Cross-Int. 11. I mean to ask you when you began to have made for you, and to sell as you have stated, protectors exactly like Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public. Will you please answer the question?

Ans. I made protectors exactly like this exhibit in substance and principal in the latter part of the year 1873, or the first part of the year 1874.

Cross-Int. 12. Will you please answer my question? I do not ask you about protectors the same in substance or principle. I ask you when you first had made and sold protectors exactly

like Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, as you have stated?

Ans. I began to sell this particular style of protector in October, A. D. 1876.

Cross-Int. 13. To whom did you sell it at that time?

Ans. To nearly all the dry and fancy goods dealers in Boston.

Cross-Int. 14. Please name some of them, as many as you can?

Ans. Jordan, Marsh & Co.; Hogg, Brown, Taylor & Co.; Churchhill, Gilchrist & Smith; Lewis Coleman & Co.; Frost Bros. & Co.; Shuler, Shutz & Co.; and many others whose names I can give if you wish them.

Cross-Int. 15. Before you began to sell these protectors, the same as Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, you sold, did you not, protectors exactly the same as that described in your patent?

Ans. Yes, and I do now. The broad principle of my patent is a strip of waterproof material between the lower part of the dress and the pavement, and I have never sold a protector that was not constructed upon that principle.

(All after "yes" objected to as irresponsive and incompetent.)

Cross-Int. 16. Please state whether or not you have since October, 1876, sold any protectors exactly like the one described in your patent?

Ans. Yes. Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, is exactly like the one described in my patent.

Cross-Int. 17. Have you since October, 1876, sold any protectors except those exactly the same as Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public?

Ans. I sold, I think, two sample dozen that were not fluted upon the edge, yet in principle they were exactly like those in that exhibit.

Cross-Int. 18. Is that all that you have sold since October, 1876, that were not exactly like the exhibit?

Ans. When you say exactly like the exhibit, do you mean in principle or in style. I do not understand you.

Cross-Int. 19. I mean exactly the same as the exhibit. Will you please answer the question with that understanding?

Ans. Without regard to form or style, which I think make very little difference, as I believe the first inventor of an article like this has a right to all forms; and I cannot understand how any other person can be allowed to take my principle, and, merely by altering the form, rob me of the invention—without regard to style or form, I have not.

(Answer objected to as irresponsive.)

Cross-Int. 20. Will you please say whether or not since October, 1876, you have sold any protectors except protectors exactly the same as Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public?

Ans. Without regard to style or form, I have not.

Cross-Int. 21. Please describe the protector as sold by you since October, 1876, and state in detail in what respect, if any, they have differed from Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public.

Ans. I have sold none that differs in principle from that exhibit.

Cross-Int. 22. Please answer my last question or decline to answer it.

Ans. I certainly do not decline to answer the question. All the protectors that I have sold were substantially like this protector, Macdonald Protector, J. H. T., Notary Public, and ex actly like it in principle.

Cross-Int. 23. Question repeated.

Ans. I have answered your question to the best of my ability. I have said that they were substantially the same.

Cross-Int. 24. Do you mean by substantially the same, exactly the same?

Ans. Yes, in principle.

Cross-Int. 25. Do you mean that these protectors, sold by you since October, 1876, have all been exactly the same as Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public. If you do not mean that, will you state in detail exactly how they differ from that exhibit?

Ans. I mean that in principle they were all like this exhibit.

Cross-Int. 26. Will you give no other answer to my question? I am not asking you in regard to principle, or what you consider principle.

Ans. I have answered your question to the best of my ability, and I will leave it for the Court to decide whether or not they are sufficiently answered.

Cross-Int. 27. Since October, 1876, have you sold any protectors except protectors having a rubber border marked with parallel lines or creases like Complainant's Exhibit Macdonald Protector, J, H. T., Notary Public?

Ans. All the protectors that I have sold since that date have been composed of water-proof material and, with the exceptions of *two or three sample* dozens, *they have all had fluted borders.*

Cross-Int. 28. I must insist upon an answer to my last question, which is now repeated. Will you please to answer it or decline to answer it.

Ans. I think your question is fully answered; all the protectors that I have sold since that date were substantially like this exhibit.

Cross-Int. 29. When you speak of binding in your deposition you mean something which is folded over and covers the bottom edge of the skirt of a dress, do you not?

Ans. Yes, when I speak of ordinary dress binding like Complainant's Exhibit Goff Binding, J. H. T., Notary Public.

Cross-Int. 30. What else do you mean by the word "binding" as you have used it, except something which is folded over and covers the bottom edge of the skirt of a dress? Please explain fully.

Ans. In my deposition I spoke only of the ordinary bindings for the bottoms of dresses.

Cross-Int. 31. The binding that you spoke of in your deposition is something which is folded over and covers the bottom edge of the skirt of the dress, is it not?

Ans. When I spoke of Goff's braid or binding as any ordinary binding for dresses, I meant, of course, something that is folded over the lower edge of the skirt to finish the same.

Cross-Int. 32. Do you understand that the binding described and shown in the De Forest patent, to which you have referred, is to be used in this way?

Ans. Figures 3 and 6 of the De Forest patent appear to be strips of ordinary binding folded around or over the lower edge of a dress, *a* and *a* being the binding, *d* being the rubber which hangs to the edge, and, as the patent says, "is enlarged." Figure 2 of the De Forest patent is, as I have described it in my deposition, and as appears in Complainant's Exhibit A, De Forest Binding, H. B. C., Special Examiner, two strips of "ordinary binding, *aa*, the one upon the outside and the other upon the inside of the skirt, vulcanized to a piece of rubber *d*, which, of course, hangs to the lower edge of the skirt or dress as shown Complainant's Exhibit A, De Forest Binding, H. B. C., Special Examiner, also in the De Forest patent.

Cross-Int. 33. How much of the bottom of a skirt must a protector cover in order to be a skirt protector in the sense in which you use the term?

Ans. That depends on the length of the skirt.

Cross-Int. 34. Do you mean that it depends upon how much of the skirt drags on the ground or floor?

Ans. If a strip of waterpoof material is sewed into a skirt so as to hang between the lower edge and the braid or binding thereon, and the floor or pavement, it does not make much difference about the width. It may be any width acccording to length of the dress.

Cross-Int. 35. Well, what do you mean by the expression, "it may be any width according to the length of the dress"? How much of the dragging part of the skirt must it cover?

Ans. I mean that I don't wish to limit myself to any width of protector. How much of the dragging part of the skirt it must cover depends upon the length of the skirt and the taste of the wearer. At present the demand is for those from two to two and one half inches wide. In my own skirts I wear them very much wider.

Cross-Int. 36. If a skirt drags six inches on the ground or floor, how wide must the protector be?

Ans. That is according to the taste of the wearer. Such dresses are usually held up and not allowed to drag when on the street, therefore an ordinary protector, say of the width of Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, would be a protection if properly sewed in. I mean if sewed in so as to hang between the braid or binding and floor.

Cross-Int. 37. Do you mean to say then, that the necessary

width of the protector depends upon the taste of the wearer, provided the protector hangs between the braid or binding and floor?

Ans. I mean that any strip of waterproof material going between the lower edge of the dress and floor or pavement is a skirt protector, no matter what width it may be.

Cross-Int. 38. Suppose that an inch or an inch and one half were cut from Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, so as to leave it the same as it now is, with the marked or creased rubber edge, but an inch or an inch and a half narrower, would that still be a skirt protector?

Ans. If sewed on between the lower edge of the dress or binding and skirt, it would of course protect that binding or braid, and would also be some protection to the facing.

Cross-Int. 39. Would it or not still be a skirt protector in the sense in which you have used that term. Please answer my question yes or no?

Ans. I have answered your question, that it would be a skirt protector so far as it goes; but it would be better if it were wider.

Cross-Int. 40. Please look at the article now shown you, marked "Defendant's Exhibit Z, H. B. C., Special Examiner," and say whether or not that is a Macdonald protector?

(Defendants here offered Exhibit marked "Defendants' Exhibit Z, H. B. C., Special Examiner.")

Ans. It is, in all probability, an infringement on the Macdonald patent.

Cross-Int. 41. Do you mean to say that it is a Macdonald protector; if not, what do you mean?

Ans. I mean to say that it is an infringement on the Macdonald patent.

Cross-Int. 42. It is exactly the protector described in the Macdonald patent, is it not?

Ans. It answers the patent and is a protector so far as having a waterproof material go between the binding and the pavement, but it is not of my make.

Cross-Int. 43. Suppose it were half as wide as it is, and yet had the waterproof edge as now, would it still be a skirt protector, in your opinion?

Ans. Yes; but a very poor one.

Cross-Int. 44. You have spoken of Complainant's Exhibit Macdonald Protector, J. H. T., Notary Puplic, as one style of the Macdonald Protector, have you made any other style of Macdonald protector since October, 1876?

Ans. I have not, except the sample dozens I have spoken of that were without the fluting on the edge.

Cross-Int. 45. Before that date you made protectors of the style of Defendant's Exhibit Z, H. B. C., Special Examiner, did you not?

Ans. I never made one like that in my life.

Cross-Int. 46. In what respects did the style or styles of protectors that you did make between the date of your patent and

October, 1876, differ from Defendants' Exhibit Z, H. B. C., Special Examiner; please state the differences in detail, if any?

Ans. I have only made two styles of skirt protector; the first is alluded to on page 157 of the old record in answer to one hundred and sixty-second cross-interrogatory, and is spoken of there as Complainant's Exhibit No. 23; it differs from Defendant's Exhibit Z, H. B. C., Special Examiner, in being composed wholly of waterproof material; the second and last style is Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public; these are the only styles I have made to sell.

Cross-Int. 47. Why did you change from one style to the other?

Ans. Because I found by experience that cloth coated with rubber wears better than cloth enamelled or japaned.

Cross-Int. 48. Why did you change from the plaited style shown in Defendants' Exhibit Z, to the style having a piece of rubber marked or greased, attached to the edge of the protector, and not plaited, shown in Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public?

Ans. I have already stated that I did not make Defendants' Exhibit Z, H. B. C., Special Examiner, and have never made one of the kind.

Cross-Int. 49. Why did you leave off plaiting your protectors?

Ans. Because the fashion changed.

Cross-Int. 50. Do you mean because plaits went out of fashion?

Ans. They have not gone wholly out of fashion, but narrow plaitings are not worn so much as formerly; besides, I found by experience that a fluted rubber band, as shown in Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, is much more durable than plaiting.

Cross-Int. 51. What has the binding of the bottom edge of a skirt to do with the operation of a skirt protector?

Ans. The operation of the skirt protector has much to do with the braid or binding on the lower edge of the skirt; the binding is protected from moisture, dirt, and wear by the protector, as is also the lower portion of the facing of the dress.

Cross-Int. 52. Supposing Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, has not the parallel marks or creases which now appear on it, and otherwise remained the same, would it still be a skirt protector, in your opinion?

Ans. It would.

Cross-Int. 53. Would it still be a Macdonald Protector in your opinion?

Ans. It would.

Cross-Int. 54. Look at the article now shown you, and marked "Defendants' Exhibit Y, H. B. C., Special Examiner," and say whether or not a strip like that and as long as Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, would be a skirt protector in your opinion?

(Defendants here offer as evidence exhibit marked "Defendants' Exhibit Y, H. B. C., Special Examiner.")

Ans. It would.

Cross-Int. 55. Would it be a Macdonald Protector in your opinion?

Ans. It would be an infringement of the Macdonald patent, because it takes that principle.

Cross-Int. 56. Have you, or has any license of yours under your patent, been sued for infringement of the De Forest patent on account of the manufacture or sale of your protector?

Ans. No suit has been brought against me, but the Combination Rubber Company, of New York City, have been sued by Theodore D. Day for manufacturing skirt protectors for me, said suit having been brought under the De Forest patent.

Cross-Int. 57. You mean Sally V. Day, do you not, instead of Theodore D. Day?

Ans. Upon the report of the case it appears that Sally V. Day, wife of Theodore D. Day, of Elizabeth, N. J., was complainant.

Cross-Int. 58. The protectors made for you by the Combination Rubber Co., as you have said, were the same style as the Complainant's Exhibit Macdonald Protector, J. H. T., Notary Public, were they not?

Ans. They were, with the exception of the few sample dozens that I have already spoken of.

Cross-Int. 59. This suit against that company for making these protectors is now pending in the United States Circuit Court for the Southern District of New York, is it not?

Ans. I must here remind you that your question is objectionable and irrelevant, and that no such matter is brought out in my direct-testimony; I must refer you to the record of the case.

Cross-Int. 60. Are you defending that suit?

Ans. I am not.

HELEN MARIE MACDONALD.

Attest:

H. BURR CRANDALL,
Special Examiner.

EVIDENCE FOR DEFENDANTS IN REBUTTAL.

TAKEN PURSUANT TO THE SIXTY-SEVENTH RULE OF THE SUPREME COURT OF THE UNITED STATES, IN EQUITY, AS AMENDED,

BEFORE ME,

J. HENRY TAYLOR, Notary Public.

BOSTON, Feb. 19, 1878.

Present—Miss HELEN M. MACDONALD, *pro se;*
JABEZ S. HOLMES, Esq., of Counsel for Defendants.

The complainant requests the following statement to be entered of record:

I, Helen M. Macdonald, the complainant in this case, would here remind learned counsel for defendants that he not only told me that he had finished his evidence, but sent his clerk to my

house, who informed me (in the presence of my servant) that he had closed his evidence, and at a certain time would be ready to go on with mine; also, that the deposition of J. C. Young, after being completed, was filed in the United States Circuit Court, and certified to Dec. 20, 1877, as said deposition will show. I therefore object to any rebutting testimony being taken by the defendants, because I do not believe it is lawful or just for them to take rebutting testimony after having officially informed me that they had closed their evidence, and after they had heard mine. I now give notice to counsel, for defendants, that on or before the day of hearing I will move to have any evidence now taken stricken from the record.

(Counsel for defendants states that if the above statement of complainant is intended to assert or imply that counsel for defendants at any time or in any way agreed with or stated to the complainant that he would take no evidence in rebuttal of the evidence to be taken or taken for complainant, the statement is absolutely without foundation in fact.)

The complainant states that Mr. Holmes, counsel for defendants, did agree that he would not take advantage of her ignorance of the law or rules of Court, and that she depended upon his word as upon the word of an honorable man. She now sees very plainly that she made a great mistake, and wishes from her heart that she had asked the Court to limit the time for taking evidence.

Attest:

J. HENRY TAYLOR, Notary Public.

DEPOSITION OF J. C. YOUNG (recalled).

DIRECT-EXAMINATION by Jabez S. Holmes, Esq., of Counsel for Defendants:

Int. 1. What is the necessary width of a skirt protector, technically so called?

(Objected to as incompetent and immaterial.)

Ans. It depends altogether upon the style of dress to which the protector is to be applied; a protector one inch wide would be a good width if applied to the majority of dresses worn on the street during the last fifteen years; I refer to dresses that do not trail on the ground, but those simply reaching to the ground; for what are called trail dresses a wider protector would be necessary in order to accomplish the purpose for which a protector is made; I should, therefore, say the width of a protector should be from one inch to six inches, according to the style of the dress. In getting up this class of goods we always cater for the million, not for the exceptionally stylish people; long trails are exceptional in the sense in which I use it; they are not worn by the million, therefore but very few wide protectors are called for compared with the narrow widths.

Int. 2. What kind of bindings, if more than one, have to

your knowledge been known and used within the last fifteen years, and how have they differed from each other?

(Same objection.)

Ans. A great many different kinds of bindings have come under my personal notice during this time, among which I recall at this moment braids of silk and cotton of a great variety of quality, texture and style of braiding, the widths varying from a quarter of an inch to two inches or more; stay bindings of different qualities, in various widths; stay bindings here does not refer to bindings exclusively for stays or corsets, but better described as cotton twilled tapes, an article very ordinarily used; flannel bindings, silk ferretts, union galloons, Prussian binding; all of these kinds of bindings have been of the most ordinary use, and have been familiarly known to the trade at times during the past fifteen years; aside from these a great variety of bindings have been made for specific purposes, and used commonly among the class of manufacturers for which they were made and have varied in width, quality and colors, according to the special demands at the time; I produce a piece of binding marked "Defendants' Exhibit Stay Binding or Cotton Twilled Tapes, J. H. T., Notary Public," and also a piece of an ordinary tape binding, marked "Defendants' Exhibit Tape Binding, J. H. T., Notary Public;" the articles described themselves, as to quality and fabric, but these goods are made in a great variety of widths, all the way from a quarter of an inch to an inch and a half, but there is no special limit to the width; they can be made of any specific width required up to about two inches; in my previous deposition, Int. 62, page 189, of the printed record in this case, I refer to bindings made by stripping up a web of cotton cloth; those also would properly be classed bindings, and would be so called by any manufacturer using them.

Int. 3. How long have these wide and narrow bindings of which you have spoken, been known and used?

(Objected to as immaterial and incompetent.)

Ans. They have been used for the past twenty years, some of them during the whole period, as for instance, stay bindings and braids, and others at different times serving the specific purpose for which they have been made, going out of style for a time, and perhaps reappearing, all of this class of goods being governed very much by the style of ladies' wardrobes.

CROSS-EXAMINATION by Miss Helen M. Macdonald:

Cross-Int. 4. Is Defendants' Exhibit Tape Binding braided?

Ans. No.

Cross-Int. 5. Is it woven?

Ans. Yes.

Cross-Int. 6. Then it is made on the same principle of ordinary cotton cloth, is it not? I mean by that, that it is woven in a loom having shuttle, harnesses, reed, etc., and might be woven of any desirable width, could it not?

Ans. I don't know whether the machinery that makes this is

the same that make cotton cloth; I do know the goods are made of a variety of widths; I should suppose that they might be made into webs like ordinary cotton cloth.

Cross-Int. 7. Are they "ordinary" bindings for dresses?

Ans. I call them an ordinary binding, but not an ordinary dress binding.

Cross-Int. 8. Then what are they used for?

Ans. This particular article would be used for binding white goods of any kind if the party chose to use this kind of binding; my experience in bindings has not been as a manufacturer, but as merchant, often selling bindings to manufacturers.

Cross-Int. 9. Do you, or have you formerly dealt in bindings like Defendants' Exhibit Stay Binding or Cotton Twilled Tapes, and Defendants' Exhibit Tape Binding?

Ans. I have, very largely.

Cross-Int. 10. Is Defendants' Exhibit Stay Binding or Cotton Twilled Tapes an ordinary binding for the bottoms of dresses?

Ans. No.

Cross-Int. 11. Have you formerly been agent for a tape manufactory?

Ans. I was formerly agent for the Anchor Tape and Webbing Co., whose exclusive business was the manufacture of cotton twilled tapes, also bindings and webbings.

Cross-Int. 12. When you held the exalted position of mill agent, was it not necessary for you to know something of the machinery which manufactured those goods?

Ans. Never held any position as described. Never heard of an "exalted" position as mill agent. Don't understand why any such terms are used.

Cross-Int. 13. In aswer to cross-interrogatory 11 you have said, "I was formerly agent for the Anchor Tape and Webbing Co.," etc. Do you wish that answer to stand as you have given it?

Ans. The answer is on record as agent for the Anchor Tape and Webbing Company. Let it stand as such, for I was their agent in Boston.

Cross-Int. 14. I believe you have formally testified that you were the agent of G. Sidenberg & Co. to sell the Day skirt protector in Boston; am I right?

(Objected to as immaterial and not open on cross-examination of the witness.)

Ans. I will refer you to the previous testimony.

Cross-Int. 15. I ask you now if you have not the agency of Theodore D. Day, to sell his skirt protectors in Boston?

(Same objection.)

Ans. I am doing no business with Theodore D. Day at the present time.

Cross-Int. 16. Then you are the agent of G. Sidenberg & Co., to sell the Day protector, manufactured by G. Sidenberg & Co., are you not?

(Same objection.)

Ans. I am.

Cross-Int. 17. How do you bill those goods to your customers, as bindings or protectors?

(Same objection.)

Ans, As dress protectors.

Cross-Int. 18. Have you ever known them to be used as bindings?

(Same objection.)

Ans. No.

Cross-Int. 19. Will you look at Complainant's Exhibit B, Macdonald Protector, and state whether or not that has a binding upon the lower edge?

(Same objection.)

Ans. It has.

Cross-Int. 20. Has it also a protector?

(Same objection.)

Ans. It has.

Cross-Int. 21. Will you please look at Complainant's Exhibit Ribbons, and state whether they are fair samples of ribbons?

(Same objection.)

Ans. They are fair samples of ribbons [as samples of the class of ribbons to which they belong. No doubt each piece here fairly represents the pieces from which it was taken; but to ask me if those are fair samples of ribbons is as absurd as to take a child's primer and ask me if it is a fair representative of books. Each represents its own class; no more and no less.]

(Portion of answer in brackets objected to by complainant as not responsive to the question.)

Cross-Int. 22. Are ribbons like this exhibit ever sold for ordinary bindings for the bottom of dresses?

(Same objection.)

Ans. I have never seen any.

Cross-Int. 23. Do you mean by that, that you have never seen or known of any being sold for that purpose?

(Same objection.)

Ans. I have never seen or known of any ribbons like those being sold for binding the bottoms of dresses.

Cross-Int. 24. Please look at Complainant's Exhibit Macdonald Protector, and Complainant's Exhibit Day Protector, both being water-proof skirt protectors, and state whether or not the Day Protector is an infringement of the Macdonald Patent Protector?

(Objected to as incompetent, immaterial, and not open on the cross-examination of this witness.)

Ans. Neither of these exhibits are described or referred to in the so-called Macdonald patent. This Complainant's Exhibit Macdonald Protector is, without doubt, an imitation of Complainant's Exhibit Day Protector, and is, without question, a direct infringement of the DeForest patent. I can, therefore, see no way in which the Complainant's Exhibit Day Protector can possibly be interpreted to be an infringement upon this so-called Macdonald Protector.

Cross-Int. 25. Without regard to form, are they, in your opinion, entirely different?

(Same objection.)

Ans. I don't know what "entirely different" means. I don't understand the question. They are both protectors without doubt, made on the same general principle. Both being protectors, I shouldn't suppose they could be entirely different. The Day protector was put on the market first, and I have always supposed that this Complainant's Exhibit Macdonald Protector was got up in imitation of the Day Protector, from the fact that the Day Protector was having a large sale and had almost entirely driven out of the market all other protectors.

Cross-Int. 26. Will you please answer the last question?

(Same objection.)

Ans. I have answered that to the best of my ability.

Cross-Int. 27. Without regard to form, are they different or are they alike in principle and operation?

(Same objection.)

Ans. I have already said that they are made on the same generaal principle, which is definitely described in the DeForest patent. I therefore think that they are alike in principle and operation.

Cross-Int. 28. Is this Complainant's Exhibit Day Protector a patented article?

(Same objection.)

Ans. This Day Protector is made under two patents, one called the DeForest patent, and the other called the Day patent.

Cross-Int. 29. How long has the Day Protector been sold as an article of merchandise?

(Same objection.)

Ans. For several years; I cannot give the dates.

Cross-Int. 30. Give them as near as you can; I mean protectors exactly like Complainant's Exhibit Day Protector in form?

(Same objection.)

Ans. I object to being asked to guess about anything as a witness; it may be three or four years.

Cross-Int. 31. You have not been asked to guess; but, as you are the agent for these goods, one might reasonably suppose that you could answer that question without guessing; for my own part I prefer facts to guess work. How long have you known these goods, like Complainant's Exhibit Day Protector, to be sold as an article of merchandise?

(Same objection.)

Ans. I can't state exactly; it may be three or four years since I first took hold of the goods; I think it is about that; they may have been sold before I took hold of them.

Cross-Int. 32. How long have you sold them?

(Same objection.)

Ans. I have already stated, between three and four years I think; I couldn't tell exactly without referring to my books.

Cross-Int. 33. Are you sure it is as long as three years since you first began to sell them?

(Same objection.)

Ans. I think it is.

Cross-Int. 34. Were they always marked with the same ticket as that on Complainant's Exhibit Day Protector?

(Same objection.)

Ans. I don't remember whether they were or not; I can't remember.

Cross-Int. 35. Then you sell without paying attention to the tickets or labels with dates thereon, do you?

(Same objection.)

Ans. I paid very little attention to the labels or tickets.

Cross-Int. 36. Did you sell these goods before Day's patent issued?

(Same objection.)

Ans. I have already said I can't give the date when I commenced selling these goods, without referring to my books.

Cross-Int. 37. Please look at Defendants' Exhibit Z, and state whether or not that, in its present form, is a binding?

Ans. No.

J. C. YOUNG.

Attest:
J. HENRY TAYLOR,
Notary Public,

BOSTON, February 27, 1878, 10.20 A. M.

Present—JABEZ S. HOLMES, Esq., of Counsel for Defendants.

Miss HELEN M. MACDONALD duly notified, as appears by annexed notice, but not present.

DEPOSITION OF J. O. PRINCE.

DIRECT-EXAMINATION by Jabez S. Holmes, Esq., of Counsel for Defendants.

Int. 1. Please state your name, age, residence and occupation?

Ans. J. O. Prince; I am thirty-six years of age; reside in Boston, Mass.; I am engaged in manufacturing fancy dry goods.

Int. 2. For how long have you been engaged in that business?

Ans. From 1857 to 1860 I was engaged with John B. Prince & Co. Their business was fancy dry goods. From 1860 to the present time, with the exception of one or two years, I have been engaged in the manufacture of goods for ladies' wear of various kinds.

Int. 3. During the time you have been engaged as above stated, have you had occasion to become acquainted with articles known and used as bindings?

Ans. I have, and am acquainted with articles used as bindings.

Int. 4. How wide have these bindings been during this time?

Ans. You might say from five-eighths of an inch to two and one-half inches. I here produce a specimen of binding which we have used for binding the tops of ladies' skirts either in white or colored.

(It is offered in evidence, and marked "Defendants' Exhibit Prince Binding, J. H. T., Notary Public.")

Int. 5. How long have these wide bindings, such as Defendants' Exhibit Prince, been known and used?

Ans. Such a binding as the exhibit has been used for underskirts and petticoats as long as I remember, certainly for the last fifteen years, and as long ago as 1860, a wider binding was used for the side pieces of hoop skirts. I, myself, or the parties with whom I have been connected in business, have used these wide bindings on skirts; on hoop skirts as early as 1860 or 1861.

J. O. PRINCE.

Attest:
J. HENRY TAYLOR,
Special Examiner.

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

IN EQUITY.

HELEN M. MACDONALD
v.
S. M. BLACKMER ET AL.

Miss HELEN M. MACDONALD,
No. 433 Washington st., Boston.

Dear Madam,—In above entitled case please take notice, that evidence for defendants will be taken before J. Henry Taylor, Esq., Notary Public, at his office, No. 82 Water st., Room 9, on Wednesday, February 27, 1878, at ten o'clock A. M.

Yours resp'y,
[SEAL.] BROWNE & HOLMES,
Counsel for Defendants.

Boston, February 26, 1878.

STATE OF MASSACHUSETTS, }
County of Suffolk, } ss.:

Personally appeared before me, a Notary Public, PHILIP H. COWDELL, who being duly sworn, deposes and says: That he served the notice, of which the above is a true copy, upon

Cross-Int. 33. Are you sure it is as long as three years since you first began to sell them?

(Same objection.)

Ans. I think it is.

Cross-Int. 34. Were they always marked with the same ticket as that on Complainant's Exhibit Day Protector?

(Same objection.)

Ans. I don't remember whether they were or not; I can't remember.

Cross-Int. 35. Then you sell without paying attention to the tickets or labels with dates thereon, do you?

(Same objection.)

Ans. I paid very little attention to the labels or tickets.

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(Same objection.)

Ans. I have already said I can't give the date when I commenced selling these goods, without referring to my books.

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Ans. No.

J. C. YOUNG.

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Ans. I have, and am acquainted with articles used as bindings.

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J. O. PRINCE.

Attest:
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Counsel for Defendants.

Boston, February 26, 1878.

STATE OF MASSACHUSETTS, }
County of Suffolk, } ss.:

Personally appeared before me, a Notary Public, PHILIP H. COWDELL, who being duly sworn, deposes and says: That he served the notice, of which the above is a true copy, upon

Helen M. Macdonald, on the twenty-sixth day of February, 1878, by delivering the same addressed to her at her place of business, No. 433 Washington street, Boston, to her servant, in the presence of said Macdonald.

PHILIP H. COWDELL.

Subscribed and sworn to, this twenty-seventh day of February, 1877, before me.

[SEAL.] J. HENRY TAYLOR,
Notary Public.

116-593

OFFICE SUPREME COURT U. S.
FILED.
JAN 7 1886
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 123.

JOHN SHEPARD, HENRY NORWELL AND ROBERT FERGUSON, AS SHEPARD, NORWELL & COMPANY,
Appellants,

vs.

EDWARD C. CARRIGAN, ADMINISTRATOR OF HELEN M. MACDONALD, DECEASED.

BRIEF FOR APPELLANTS.

EDWARD N. DICKERSON,
Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 123.

JOHN SHEPARD, HENRY NORWELL and Robert Ferguson, as Shepard, Norwell & Company,

Appellants,

vs.

EDWARD C. CARRIGAN, ADMINISTRATOR of Helen M. Macdonald, deceased.

BRIEF FOR APPELLANTS.

State of the Case.

This is an appeal from a decree of the Circuit Court of the United States for the District of Massachusetts, in favor of Helen M. Macdonald, now deceased, against John Shepard and others, holding them as infringers of the Letters Patent granted to Helen M. Macdonald, December, 29th, 1874, for an improvement in dress protectors.

The subject matter of the patent is very accurately stated in the claim in these words :

" *As a new article of manufacture*, a skirt (facing or) " protector, *having a fluted or plaited border*, bound with " or composed of *enameled cloth* or other water-proof " material, substantially as and for the purpose set forth."

By a disclaimer the patentee disclaimed the words " facing or " out of the claim (pp. 11 and 12).

The thing convicted as an infringement of this patent was a *plain strip* of India rubber cloth, upon the lower edge of which a rib of vulcanized rubber was stitched, which rib, by reason of its thickness and durable quality, protected the strip from wearing out at its edge, and the strip protected the dress from moisture. This article was patented February 4th, 1875, to Theodore D. Day (p. 13).

Infringement.

The only testimony of infringement in the *prima facie* case was by the complainant herself, who offered the Day patent in evidence, testified that she bought a specimen according to that patent in the store of the defendants, and ended a vituperative harangue about the Day protector by saying :

" The only thing to be wondered at is that some poor " unfortunate female has not stumbled and broken her " neck by getting her feet entangled in the edge of Mr. " Day's 'Protector' " (pp. 9 and 10).

She was then called upon to produce any proof that the defendant's protector was substantially the thing described and claimed in her patent ; and notified that objection would be made to any atttempt to prove infringement after the *prima facie* case closed ; but she rested her case without any proof.

After the defense had been put in, she called another witness, James G. Bowden (p. 57), and asked him (Ques. 6) whether he thought that Day's protector was an infringement of her patent, and he thought it was.

Upon an attempt to cross-examine this witness, he was

prompted in his answers by her, and when the Examiner, at the request of defendant's counsel recorded that fact, she said:

"Mr. Morse, you are no longer employed by me. If a "*man* was taking the evidence, it would not be so. I "must have a United States Commissioner" (p. 60).

And that ended the attempt to cross-examine at that time.

Afterwards, he was cross-examined (p. 61), when his capacity to express an expert opinion was tested, and he was asked the question:

"Cross Q. 25. Then you consider that this patent de- "scribes substantially *a strip of plain enamel cloth* or "other water-proof material, as well as *a strip of plaited* "*or fluted enamel cloth* or other water-proof material "shown in Fig. 1 of the drawing?

"A. I do."

In answer to the 29th and 30th questions, he said:

"I think any skirt protector of water-proof material, "*merchantable* to-day, is covered by this patent."

"I consider that *all skirt protectors of a water-proof* "*material*, since this patent was issued, were covered "by it."

In answer to cross-question 56, he said:

"My idea of the Macdonald patent is, that it covers all "skirt protectors of water-proof material."

This being his comprehensive view of the subject, which saved any trouble of understanding the patent, he testified that the thing described in the patent was not a practical skirt protector, because it was made of *enameled cloth*, which was unfit to be used for that purpose; and that it was necessary, in a skirt protector, to have a rib at its lower edge, like the Day protector; and that he did not "know of any *practically successful skirt protector* for "use on the street to-day which hasn't this rubber rib on "its lower edge" (p. 70, Cross-Q. 71).

The complainant herself objected to the cross-examina-

tion, "because the thing shown in Fig. 1 of the *complain-* "*ant's patent* was made to *represent* a skirt protector, "*but being made of heavy enameled cloth, although it rep-* "*resented a skirt protector, was entirely unfit to sell for* "*that purpose*" (p. 64, fol. 95); which is the opinion of the patentee of her own invention; and according to the testimony of the "expert," the very thing described in the patent would not infringe it, since it is not a "*merchant-able*" article.

The complainant herself also made this objection to her own witness:

"(Objected to by *complainant* because the witness has "already said he never saw such a thing, *and because he* "*has not been qualified as an expert in patents, he simply* "*being a salesman, and knowing these articles as articles* "*of merchandise*" p. 64).

And this constitutes the entire testimony in the case, showing, or tending to show, that Day's protector is an infringement of the Macdonald patent.

The defendants, however, called an expert (Mr. Serrell, p. 41). This witness pointed out the state of the art, well-known for years, to be that skirt protectors were made of plain enameled cloth attached to the lower edge of dresses; and then said:

"As I understand the Letters Patent of complainant to "relate to the *article of manufacture, no matter how it* "*may be applied to the dress*, I consider that the plaited "water-proof protector may harg loosely inside the bot-"tom of the skirt, the same being connected at the top "edge only, as illustrated on 'Protector samples,' No. 1, "No. 3, No. 4 and No. 5, or the lower edge may be se-"cured by a binding, as illustrated by No. 2 of said 'Pro-"tector samples.' From the foregoing it will be apparent "that the patent of complainant, in my judgment, and in "view of the state of the art, *is to be limited to a skirt* "*protector similar in every respect to that which had been* "*made before out of 'wiggan,' a water proof material be-*"*ing substituted for the wiggan, and made up with flutes* "*or plaits, instead of being used flat, as the said water-*"*proof material had before been used*; or, in other words, "it is to be limited to the water-proof material when made "up in the form of a strip with transverse flutes or plaits, "instead of being used as a flat strip.

"Int. 4. Does the patent describe or suggest anything "as the invention of the patentee except the making of a "plaited protector, water-proof either by composing it en- "tirely of water-proof cloth, or binding it with water- "proof cloth?

"A. *It does not.*

The witness who gave the history of the art, compared the De Forrest patent with the Day patent, and with the Morrison protector, which was a plain strip of enameled cloth, for a long time in use and on sale in the market; and then said (p. 43):

"The Macdonald protector is nothing more or less than "the Morrison protector folded with traverse plaits or "flutes sewed together to keep these plaits or flutes in "their place. In the Day protector there are not any "traverse plaits or flutes. The water-proof material is "flat, the same as in the Morrison protector, and the Day "protector is nothing more or less than the Morrison pro- "tector with a strip of ribbed india rubber sewed to the "same near one edge."

The De Forrest patent of 1867—*seven years earlier than Macdonalds* (p. 53), is for a strip of cloth "thinly coated with india rubber," to which is vulcanized a rib of india rubber, as shown in the five figures of the patent, and the specification describes its use "to present an edge of india rubber or other flexible material *below the edge of the skirt to* PROTECT *the same from wear by contact with the floor or pavement.*" This differs from the Day protector only in the circumstance that the rubber rib is usually first vulcanized to the cloth strip in the De Forrest patent, whereas it is stitched on in the Day patent, after it is vulcanized; and it is obvious that if Day's protector infringes, so does De Forrest's.

In the Blackmer case, the record of which was an exhibit in this case, in which Macdonald was suing a "fluted" water-proof protector, the De Forrest patent was set up against her; but inasmuch as she was maintaining her patent only for a "fluted" protector, she disposed of the De Forrest patent very summarily. She thus swore: "Why! "*a skirt protector having a fluted border,* and composed "of water-proof material like exhibit 'Complainant's Ex-

"hibit Macdonald Protector, J. H. T., Notary Public,' is "no more like the De Forrest binding than a church organ "is like a wheel barrow" (p. 304); which is true enough if the thing patented by her is a "fluted" protector. In that same examination she swore (p. 310, q. 37): "*I mean* "*that any strip of water-proof material, going between* "*the lower edge of the dress and floor or pavement, is* "*a skirt protector, no matter what width it may be,*" which accurately defines De Forrest's protector as his patent describes and shows it.

This constituted the entire testimony on both sides on the subject of infringement; and upon that his Honor, in deciding the case, said (p. 104):

"The only evidence of infringement is from the plain-"tiff herself, who produces a strip of water-proof cloth "with a strip of india rubber sewed to its lower edge, "which she swears is exactly like what she has seen sold "by the defendant, as and for skirt protectors. *This ap-*"*pears to me a sufficient proof of infringement, in the* "*absence of contradiction.*"

In his opinion, the Judge did not reason out the conclusion he reached that the Macdonald patent was *not limited* to the specific thing described and claimed in express terms; nor did he show how he avoided the fact that Macdonald had applied for a patent for water-proof skirt protectors generally, and had been repeatedly rejected, and then had taken a patent for the specific thing she invented, namely, the *mere* substitution of "enameled cloth" for "wiggans" in fluted protectors, made just as she describes. Nor did he dispose of the testimony by herself and her witnesses, that the material described in the patent was entirely worthless, and that the Day protector was the only vaulable thing. But he refers himself to the opinion of the Commissioner of Patents on the interference between Macdonald and Chase, in which the only question was, who was the first inventor of "fluted" water-proof protectors, and in which case Chase fixed his conception "of the idea of using *a plaited strap of india rubber as a skirt protector*, in November, 1872" (p. 94).

And in that interference (p. 95) Macdonald swore that

"Between the month of December, 1861, and the month "of January, 1865, I did affix to the skirts of FOUR DRESSES "A WATER-PROOFED FACING OR PROTECTOR. I had worn "it continually from that time until 1868. Mrs. Mary "B. Arden has seen me wear such a dress protected with a "water-proofed FACING OR PROTECTOR."

She then distinguished this "facing or protector" from a "lining" or a "binding," and defined the term "protector" to "mean *any water-proof fabric or material that will protect a dress or dress material from wearing or moisture*" (CrossQs. 7 to 22, p. 95, fols. 138 to 140).

And she also swore that other people were using the same material plain at the same time she was for facings (p. 97, Qs. 33 to 39).

She also called May Allen, and asked her this question (p. 99):

"Int. 1. In what year did you see a dress skirt, the "property of Helen M. Macdonald, which had upon it *a* "*water-proof* FACING *affixed to the lower edge of the skirt* "*as a* PROTECTOR, said FACING being composed of enam- "eled cloth?

"A. In 1863."

And she repeated the same question to Bedell, another witness.

These I cite merely to show that the word "facing" was used a synonymous with "protector;" and that when she admitted that other people were using the same material for "facing" at the same time she was, the word "facing" signified "protector." The object of this testimony in the Patent Office was to carry back the date of *experiments* leading up to the "fluted protector," and not to obtain a patent *from the Patent Office* for a plain strip of enameled or other water-proof material for that purpose.

Judge Lowell seems to think, however, that this proof enlarges the scope of the patent, whereas the Patent Office itself refused a patent for an enlarged claim in view of the facts, and limited it to the fluted protector, as the record shows.

The Examiner's report, p. 149, thus states the decision: "All that was decided in the interference matter was

" that she anticipated Chase and other parties in the in-
" vention of *a fluted or plaited water-proof skirt pro-*
" *tector,* just what she claimed, *not originally, but in mod-*
" *ified form, after being informed of the state of the art.*"

As will hereafter appear, the same material was generally used in New York, years earlier, for the same purpose that Macdonald and others were using it in Lowell; which disposes of the *experiments* of Macdonald and the Lowell women who were using it there--even if it were law that this patent could be enlarged beyond the only specific thing described and claimed in it, by showing that the patentee had used plain enameled cloth as a protector in 1865.

II.

But as the foregoing argument failed before Judge Lowell, it is my duty to show that this woman was not the inventor of skirt protectors, and never claimed to be; but that, on the contrary, she expressly disclaimed it, and got her patent for the limited thing which she did secure by expressly disclaiming the broad ground on which alone such a decision as Judge Lowell's proceeded.

She applied for a patent on the 6th day of May, 1873, for substantially the invention now covered by it. These were the words of her application (p. 137):

" SPECIFICATION.

" *To all whom it may concern:*

" Be it known that I, Helen Marie Macdonald, of Lowell,
" in the County of Middlesex, and State of Massachusetts,
" have invented a new and improved article for protecting
" ladies' dress skirts from damage by contact with the
" streets and sidewalks.

" My invention consists of a strip of enameled muslin
" from two to four inches wide, which may be covered
" with any dress material, such as silk, cashmere, alpaca,
" armure or tamise cloth; it is then formed in plaits
" and bound across the top (like samples), said plaits
" being held in place by one row of machine stitching
" through the center. It is then ready to be sewed in the
" dress skirt.

" My invention protects the dress from being cut or

" damaged by contact with earth or brick or concrete pave-
" ments and sidewalks, said invention being impervious
" to moisture; it also protects the skirt from being soiled
" or damaged by mud or dampness of street crossings,
" sidewalks, &c.

" It also forms a very neat trimming, and improves the
" hanging of the skirt.

" HELEN MARIE MACDONALD.

" Lowell, Mass., May 6, 1873.

" Witnesses:

" J. N. MARSHALL,

" A. D. PUFFER."

No claim was affixed to that specification; but it would evidently sustain no other claim than the one now made.

For some reason, which does not appear and has never been explained, she concluded to withdraw this application and attempt to procure a patent for a water-proof protector of any kind; and in pursuance of that plan she filed a new specification in these words (p. 139):

" My invention consists in protecting the lower edge of
" dresses and other garments by affixing thereto a portion
" of water-proofed material, or in water-prooffing the
" material itself; and I claim as my invention the use of
" *a water-proof materia,l* in whatsover form it now
" exists or may hereafter exist, *for the purpose of pro-*
" *tecting the lower edge of all garments from wear and*
" *soiling* either from friction or moisture, and refer to the
" enclosed samples as substantially representing my in-
" vention.

HELEN MARIE MACDONALD."

This claim asserted the inveution of water-proof protectors generally, and the office rejected it, giving her a reference to the patent of Mackee of 1865.

(See letter of rejection, August 9, 1873, p. 140.)

This patent to Mackee was for a plain strip of cloth or linen, to which enameled cloth was first sewed, which was attached to the dress (Rec., p. 54).

At that time there were several other patents which anticipated this broad claim, and among them that of T. B. De Forest, January 15, 1867, and no such claim as that

could have been allowed, without an interference with De Forrest (see Examiner's Report in full, p. 149). That report seems to have been drawn out by a complaint that other patents were issued for other *forms* of water-proof protectors, notwithstanding her peculiar form. But one reference was sufficient.

From this rejection the applicant appealed, and she filed her reasons, which appear at page 141, under date of August 11, 1873.

But as the case was not yet appealable, not having been twice rejected, on the 6th September, 1873, she again urged her claim upon the Examiner in these words:

"My application I still believe should be granted, for "the reason that by means of a *water-proof* fabric the "edge of the skirts of dresses will be effectually protected "from soiling and wearing, and from a long experience "in dressmaking I *have not known of the use of such* "*material*, and would respectfully refer to Gallup's Dress "Protector and Facing, granted April 29, 1873, to illus- "trate my improvement" (p. 142).

Being again rejected, October 2d, she changed her ground and discriminated against the Mackee patent by saying:

"I do *not* claim that *water-proof* material has never "been used before in dress facing, but I do claim that "Mackee's patent does not interfere with my petition, "and, to the best of my knowledge, *the raw edge, as used* "*by me, has never before been employed*" (p. 143).

This distinction was not recognized by the office as sufficent; and obviously the peculiarity which she points out is a disadvantage, because the *raw edge* of the enameled cloth immediately frays out upon the pavement, as both she and her witnesses in this case swear.

Nevertheless, it was what she then applied for, and not what she afterwards patented—although the "raw edge" is shown in her drawing.

On that subject, in this case, she testifies (Rec., p. 71):

"In that letter I called particular attention to the sam-

" ples. and the fact that they were made up with *raw* " *edges*, as this Exhibit E illustrates. That letter will be " found in the file wrapper and contents, kindly put in evi- " dence by the defendants. Now, I am very thankful to " the defendants and their counsel for putting in evidence " that very important document, to wit, file-wrapper and " contents, because it will enable me to explain the matter " so that the Court will understand that the samples al- " luded to in that letter as having raw edges, *were made* " *of japanned alpaca, and not common* ENAMELED CLOTH, " WHICH WAS ENTIRELY UNFIT FOR THE PURPOSE."

Thus, she now swears that the *raw edge of japanned cloth*, which is simply one form of enamel or oil cloth, presents the merit of the invention. No mention, however, was made of the quality of the material in that letter, and the specification on which it was founded described the material as " water-proof material."

This application being again rejected finally, with a suggestion that she might limit her claim to the *fluted* protector (p. 144), she filed a new specification in these words:

" My invention consists in protecting the lower edge of " dresses and other garments by affixing thereto a portion " of water-proofed or enameled material, *or in water-proof-* " *ing the material itself;* and I claim as a new article of " manufacture a skirt facing or protector, *having a plaited* " *or fluted border* bound with or composed of *enameled* " *cloth* or other water-proof material, substantially as and " for the purpose set forth (page 144)."

In this specification she puts forward "*enameled cloth*" as the specified material, and suggests as an alternative " *other water-proof material;*" and she makes no mention of a "*raw edge*" as an advantage, after having attempted to impose upon the office the suggestion that that was the characteristic of her intervention; nor of "*japanned alpaca*," which she *now swears* was the only material fit for the purpose, and was in fact the material she submitted to the office as " samples " of her invention.

In this case she swears that she knew when she filed that application, and had known for years, that it was impossible to make a protector out of enameled cloth (page 85, question 54).

When the claim thus stated for a "plaited or fluted"

water-proof protector was allowed, it was found to interfere with a pending application of Herbert Chase, who had filed an applicarion for a plaited or fluted skirt protector of rubber cloth, October 13, 1873.

The office declared that:

"The subject matter involved in the interference is a "skirt protector *having a plaiied or fluted water-proof* "*border*" page 145).

In that interference with Chase his fluted skirt protector was made of india rubber, while hers was made of enameled cloth. And she insisted that enameled cloth was all the same as india rubber cloth, because it was a water-proof material and came within that general description; which, no doubt is true; and she made her fight on "enameled cloth" against india rubber cloth, while she now swears in order to avoid anticipation, that "enameled cloth" was utterly impracticable, and she knew it then!

On that subject she then swore in reply to cross-questions by Chase as follows (Rec., p. 96, Cross-qs. 9 and 10):

"Cross Q. 9. Do you not know that *enameled cloth* is "not strictly water-proof?

"A. I know that it is while it remains whole.

"Cross-Q. 10. What do you mean by its remaining "whole?

"A. I mean until it is worn or broken or damaged in "some way."

So she prevailed over Chase by saying that *fluted enameled cloth* was a practical, useful and valuable invention, and the same as fluted rubber cloth.

In that controversy she was examined as a witness and testified about the origin of her invention (Record, pages 95 to 99).

After defeating Chase by proving enameled cloth to be the thing, she struck out her whole specification and substituted the present one, omitting the suggestion of water-proofing the dress itself, which was not allowed (page 146).

The Litigations.

Under this patent thus obtained, she brought a suit against one Blackmer, who was using a *plaited or fluted water-proof protector*, the very thing described and claimed in her patent (p. 162, q. 17; p. 21, q. 28; p. 164, q. 32, in which a "protector" is defined as necessarily ruffled), and the defense failed to anticipate *that* invention, either by showing the same thing to have been in former use; or by satisfying the Judge that a plain strip of waterproof material was an answer to the fluted or plaited one; or that the substitution of enameled cloth for wiggans, when water-proof cloth was old for the general purpose, was merely a double use and was anticipated by "wiggans."

In that case she was also a witness, and she changed her definition of a protector from the one she gave in the Patent Office, where she had applied for any water-proof covering to the inside of the dress; and she redefined "a protector" to be any water-proof material, *of any width*, so long as it *projected below the lower edge of the dress*. The following is her testimony at length (Record, page 309):

"Cross-Int. 33. How much of the bottom of a skirt "must a protector cover, in order to be a skirt protector "in the sense in which you use the term?

"A. That depends on the length of the skirt.

"Cross-Int. 34. Do you mean that it depends upon how "much of the skirt drags on the ground or floor?

"A. If a strip of water-proof material is sewed into a "skirt, *so as to hang between the lower edge and the braid or "binding thereon and the floor or pavement*, it does not "make much difference about the width. It may be any "width, according to length of the dress.

"Cross-Int. 35. Well, what do you mean by the expres "sion, 'it may be of any width, according to the length "of the dress?' How much of the dragging part of the "skirt must it cover?

"A. *I mean that I don't wish to limit myself to any "width of protector*. How much of the dragging part of "the skirt it must cover depends upon the length of the "skirt and the taste of the wearer. At present the de- "mand is for those from two to two and one-half "inches wide. In my own skirts I wear them very much "wider.

"Cross-Int. 36. If a skirt drags six inches on the ground "or floor, how wide must the protector be?

"A. That is according to the taste of the wearer; such "dresses are usually held up and not allowed to drag "when on the street, therefore, an ordinary protector, "say of the width of Complainant's Exhibit Macdonald "Protector, J. H. T., Notary Public, would be a protec- "tion if properly sewed in—I mean if sewed in so as to "hang between the braid or binding and floor.

"Cross-Int. 37. Do you mean to say, then, that the "necessary width of the protector depends upon the taste "of the wearer, provided the protector hangs between the "braid or binding and floor?

"A. I MEAN THAT ANY STRIP OF WATER-PROOF MATERIAL "GOING BETWEEN THE LOWER EDGE OF THE DRESS AND "FLOOR OR PAVEMENT IS A SKIRT PROTECTOR, NO MATTER "WHAT WIDTH IT MAY BE."

Still, in this definition of a protector—and it is *one* good definition—it is immaterial whether the protector be sewed at the top, or at the top and near the bottom of its own width, *so long as it projects below the edge of the dress*, and takes the abrasion of the pavement. Nothing about projecting below the edge of the dress was in the Patent Office controversy, even while she was claiming most broadly; and after she had acquiesced in the rejections, she limited herself to a new article of manufacture which was *fluted or plaited;* and whether that sort of a protector *when worn* projected below the dress, or was even with it, is immaterial; or, in other words, *as an article of manufacture*, it would have violated the patent just as much whether sewed a quarter of an inch higher or lower in the dress, or not sewed at all. Indeed, this suit is founded upon the *sale* of the strip of cloth as an articlr of manufacture, and not upon its use. It never was used at all. In the Blackmer case she had her expert swear that the "protector" was entirely independent of how it was attached (p. 165, q. 42–3).

In that case Judge Shepley sustained the patent against an infringement, which was just like it—that is, against a *fluted skirt protector;* and in his opinion he limited her claim strictly to what she described.

His opinion is in these words (p. 280):

"Since the disclaimer, which was filed before the date
" of the bill in this case, the claim of the complainants is
" limited to that only which was described in the specifi-
" cation of her patent, viz.: '*As a new article of manu-*
" '*facture, a skirt protector, having a fluted or plaited*
" '*border bound with or composed of enameled cloth or*
" '*other water-proof material.*' I see no reason to doubt
" that she was the first and original inventor of *this arti-*
" *cle* as distinguished from a skirt facing, which is an
" entirely different article, and from a skirt protector
" which, being *made of wiggan* or similar material, was
" substantially useless for the purpose, as compared with
" the complainants' invention.

" Decree for injunction and account as prayed
" for in the bill."

It was certainly a very narrow patent, to say the least of it, which rested upon substituting for fluted "wiggans," which were not water-proof, fluted enameled cloth, which was water-proof, in a fluted skirt protector; but that was the entire invention which Judge Shepley gave her.

In the decision of Judge Lowell, in this case, after the death of Judge Shepley, the patent was expanded from the narrow construction which Judge Shepley gave to it in accordance with its language, into a patent for skirt protectors generally, provided they were made of water-proof material.

After the Blackmer suit succeeded she brought the present suit against an enameled cloth protector, having a rib of rubber attached to the bottom of it, and patented by Day; and having called a witness to testify that her patent covered all water-proof protectors *of any kind*, she prevailed.

But in this case it is proved by the testimony of Morrison and others—and this proof is confirmed by Helen Macdonald's testimony in the Patent Office interference—that strips of enameled cloth for the purpose of protecting the inside surface and the lower edge of ladies' dresses were a common article of merchandise in New York as early as 1857, and that these strips were sewed into ladies' dresses so as to project below the lower edge of the dress, and thereby protect that lower edge from the pavement.

The firm of W. & J. Morrison, of which William was the senior, carried on their business as "jobbers of dress "trimmings and small wares at No. 9 Maiden Lane," New York, for years before 1856 or '7, when they moved to 79 Chambers street, and William died February, 1860. James Morrison, the grandson of one and the son of the other member of that firm, went into their employment as salesman in 1854, when he was sixteen years old, and still carries on the business of manufacturing dress trimmings on a large scale at 27 Greene street, New York. William Morrison, in his lifetime, manufactured these enameled cloth skirt protectors, and they were sold for a year after the death of William. These were "used for facing the bottom of "ladies' dresses *when they come in contact with the pave-* "*ment*," and were sewed on the skirts both by their upper edges alone and by their tops and bottoms (pp. 14 to 17). Henry Douglass, a merchant in this class of goods, and who has occupied one store for *thirty-two years*, bought these goods of the Morrisons when they were in Maiden Lane, which was before 1857, and afterwards in Chambers street, and he has had them on sale ever since, and now has them, and produces samples. The goods were of various colors to match different dress goods (pp. 18, 19). They were called "skirt protectors" (Cross-Q. 13), and were used only for the purpose of protecting the lower parts of the skirts of ladies' dresses.

Mr. Garrett, a retired merchant, living at No. 9 West Fourteenth street, was employed in the firm of James Morrison & Co., which succeeded W. & J. Morrison in 1860, and he proves the sale of these goods from 1863 to 1870. These were used as "protectors" for the lower part of ladies' dresses. He thinks they were sewed only at the upper edge (pp. 20, 21).

Theodore D. Day began in this sort of business as a manufacturer in 1861, and as an inventor of dress facing in 1865 (p. 22). He knows of the use of enameled cloth protectors in 1865 and afterwards, and states their disadvantages: they were "noisy," and would "*rapidly fray at the raw edge*." He verifies the testimony of the others as to the general sale of enameled cloth "*for over twenty years*," and he knows of their use since 1861. They were

worn with the raw edge exposed, and were easily recognized by their rattling sound. His business was to notice such things, as he was inventing and making dress facings. *No one contradicts a word of this proof!*

This unimpeached testimony merely proves what Macdonald had to admit in the Patent Office, that the enameled cloth which she says she began to use *between* December, 1861, and 1865, was in common use by others, and that it was in common use in New York, at least as early as 1857, and continued so till superseded by india rubber edged protectors after 1870 (p. 95. See her Cross-questions, 7 to 22, p. 96).

Long dresses for street wear were in fashion for several years between 1854 and '65, and there can be no doubt that enameled cloth was used to protect their back lower edges from the wet and wear of the pavement. However these strips were sewed on the skirts, whether to project *slightly below* the lower edge or not, they would be the thing claimed in the Macdonald patent, whether fastened at top alone, as the fluted ones must be, or at both top and bottom, as the Day protectors now used are generally fastened; and, therefore, if Macdonald has acquired any rights against the public and subsequent inventors, by reason of the fact that in 1862 she was using in her dresses the same material to protect them from wet and abrasion that the public generally had been using for many years before that date, and continued to use for many years after that date, it must result from some *invention* she made then, and which is protected by a patent applied for eleven years later.

Now, what was that invention which Macdonald made in 1865? It was not the use of *enameled cloth*, as she pretended in was in the Patent Office. That was old.

It was not fluting the protector cloth, for she admits that was old in her patent; and Gallup's patent was for that. She also swore that she used plain strips at that time, and that the fluting came years later.

It was not for sewing the enameled cloth by its upper edge, as it must be sewed if fluted, but not if plain. No such claim as that was ever made in the Patent Office, or in her testimony, or in that of her witnesses. And that she did not sew it that way, she now in this case swears

in the most absolute manner; because she swears that it was *impossible* to be so done, and of course she did not do what she swears *was impossible*.

In this dilemma, it being impossible to contradict this New York testimony, and it being proved beyond question and admitted that the only difference between the enameled cloth protector of 1857 and afterwards, and the protector sold by the defendants, called the "Day Protector," is that the Day protector has a rib of vulcanized rubber sewed on to the lower edge of the "protector" to *protect it* from abrasion, while *it protects the dress* from dampness and moisture, and that this additional rib is the subject of a patent to Day if his mode of attaching it to the facing, and in its general form of a patent to De Forest years before Macdonald's patent, the complainant adopted the desperate expedient of attempting to overturn the whole of the testimony by swearing that it was physically impossible to make a protector of "*enameled cloth*" at all, and that the only thing described in her patent, namely, "*enameled cloth*," could not possibly be used as a protector.

She swears (p. 74, fol. 108): "I refer once more to De-
"fendants' Exhibit Morrison Protector, and firmly state
"*it is not a skirt protector, and that it was never sold*
"*for a skirt protector*, and that IT COULD NOT BE POSSIBLY
"USED AS A SKIRT PROTECTOR; that the *enameled cloth*
"*facings* like those illustrated in Macdonald's Exhibit C,
"were used to stiffen the skirt, improve its hanging, and
"so forth." (See also Q. 36, p. 81; Qs. 54 to 58, p. 85.)

Of course, if this is true, then the whole of our testimony showing its use is necessarily false. The particular difficulty, however, which the witness had to encounter, and which she did not seem to appreciate when she resorted to this method of disposing of the facts, was, *first*, that her own claim to be an inventor at all depended upon the assertion that from 1861 to 1865 she had worn in four dresses *this very material as a* "*protector*," and it "*operated well*," which she now swears is "*impossible*" to be used for that purpose; and *secondly*, that she defeats her patent entirely by proving that the only thing de-

scribed in it is "*impossible*" to be used for the purpose proposed. In her testimony in the Blackmer case in chief she swore, p. 249, as follows, in respect to her use before 1865:

"Int. 21. Please state whether or not you so con-
" structed your protector, and attached it to the skirt so
" as to extend below the lower edge of the skirt to serve
" as a protection thereto, and to the braid thereon.
"(Objected to as immaterial and incompetent, and
" for form.)
"A. I made my protector, and sewed it upon the skirt
" *so that it would come below the lower edge of the skirt,*
" *or between the lower edge of the skirt and the sidewalk,*
" so that it should protect the braid on said skirt.
"Int. 22. Please state how long you continued to use
" such protector on your skirts of your dresses?
"(Objected to as immaterial and incompetent.)
"A. I had one or more of those dresses in my possession
" —dresses with protectors on—until the summer of 1869.
"Int. 23. What became of them, if you know?
"(Objection repeated.)
"A. I ripped the last one out in 1869 to gore the skirt;
" the others, I presume, found their way to the rag-bag.
"Int. 24. If I understand you correctly, the *enameled*
" *cloth* on Complainants' Exhibit 22 was attached to a
" straight skirt, not gored; am I right?
"A. It was attached to a straight skirt; *all protectors*
" *I put on between* 1861 *and* 1865 were put upon straight
" skirts; I never put a protector on a gored skirt until
" 1872.
"Int. 25. Please state how the protectors, attached as
" you have stated, operated to protect the lower edge of
" the skirt from dirt and wet?
"(Objection repeated.)
"A. THEY OPERATED WELL."

In the Blackmer case there was no proof that these *enameled cloth strips* were old, and well known as articles of merchandise in 1860; and, therefore, the witness laid the foundation of her claim by swearing she had adopted them in 1861, had used them either projecting below the edge of the dress, "*or between the lower edge of the skirt and the sidewalk*," which they would be in a *trailing dress* whether projecting below or not, when the skirt hung perpendicularly, and that they "operated well." What constituted the peculiarity

of the thing, as this testimony shows, was that the enameled cloth projected below the skirt—not that it was sewed at any particular point or line on its width; and this testimony, uncontradicted, was accepted by the Court as proof, and she took that early date of invention because she had used for years an *enameled cloth plain strip* sewed to the lower edge of her dress so as to interpose between it and the pavement.

And it is probably true that at *some* time—not probably in 1862—she did that very thing, because it was in common use; and it is also certainly true that she was not the first nor only person in the United States in those years who used it as she used it. Long dresses were worn at that time, and it is the most obvious thing in the world to put some waterproof material inside of the bottom of them to keep their edge from the pavement. Enameled cloth, as well as other waterproof material, was used for that purpose. Great quantities of it, cut into appropriate strips, were sold by wholesale and retail merchants in New York; and it is on sale to day for that same purpose, as Mr. Douglas proves, who brings into the case samples of it from his shelves.

A better material, however, came to be used, which has generally superseded it, although the Day protector in this case is still simply "*enameled cloth.*" The De Forest protector, which is india rubber cloth with a rib of rubber vulcanized to it, is the best, but it is the most expensive. "Enameled cloth," with a small rib of india rubber sewed fast to its edge to protect it, is practically good enough, combining, as it does, the enduring quality of the india rubber rib with the waterproof quality of the cheap enameled cloth.

When, however, the facts came out in this case, as they must needs come out the moment the claim of the patent was enlarged from covering a fluted waterproof protector, as it was in the Blackmer case, to covering a plain strip of "enameled cloth," protected by a rib of india rubber, as it now is asserted, then this person has no hesitation in swearing that what she testified to in regard to *plain enameled cloth protectors* in the Blackmer case was entirely false; and she now swears:

"I refer once more to Defendants' 'Exhibit Morrison "'Protector,' and *firmly state* it is not a skirt protector; "that it was never sold for a skirt protector; and that it "COULD NOT BE POSSIBLY USED AS A SKIRT PROTECTOR" —it being the very thing which she had sworn she used for that very purpose for many years on several dresses, and that it "*operated well.*"

On cross examination she emphasized this assertion in a variety of ways, at Cross-Q. 62, p. 86. This strip of enameled cloth was supposed, in the question, to be attached to the dress in the manner in which it has been customarily used, as sworn to by the witnesses for the defense, and as she swore in the Blackmer case, she used it for years, and she swore directly that it was "*so impracticable and absurd that she could not imagine "how such a thing could be attempted;*" that it was not a skirt protector, and she proceeded to swear that if that material were fluted, as shown in her drawing, it would yet not be practical.

In Cross-Q. 45, p. 82, she swore that at the time she applied for a patent, enameled cloth made in varieties of colors, both face and foundation was not known, but that "it was only made with a coarse white foundation similar to 'Exhibit Morrison Protector;'" and at Cross-Q. 51, she swore that in May, 1873, she knew of no enameled cloth being for sale in the market, except the ordinary enameled cloth with a white back.

Having thus thought it necessary to her case to swear that no skirt protector could possibly be made out of this enameled cloth, and that she knew of no other waterproof material but enameled cloth when she applied for a patent, she was then asked about her knowledge of "japanned cloth," which she had already sworn could be made into a protector, although enameled cloth could not, and in reply to that inquiry she swore (Cross-Qs. 53 to 55, p. 85) that she knew in October, 1873, and for *several years before* it, that enameled cloth, such as she described in her patent, could not possibly be made into a skirt protector, but that japanned cloth, which she did not describe in her patent, could be made into such protector. Of course, it follows that her patent is simply void by her own showing, if the

facts be as she swears they are; because she knew a material sufficient for the purpose, and described and patented one that she knew was not. Japanned cloth is only one variety of enameled cloth, and its name is derived from the quality of its surface, which resembles what is called "japanned ware;" but it is an oil varnish applied to cloth just as in any enameled cloth. And when she was contesting her case in the Patent Office, she insisted that "enameled cloth" was the proper waterproof material, as her testimony shows.

She is reduced here to a dilemma. If an enameled cloth cannot make a protector, which she swears positively it cannot, then her patent is void for that reason; and it is especially void when she swears she knew what was a proper material and did not describe it. And the same swearing shows that her testimony in respect to her enameled cloth protectors, worn for several years after 1861 is necessarily false; unless she can claim that she performs impossibilities. If, on the other hand, enameled cloth is a possible material for a skirt protector, as she insisted in the Patent Office, although not the best, nor very good, then the testimony is that other people long before her were using it for that purpose; and either horn of the dilemma is fatal.

The truth is, she and her witnesses were compelled to admit, that *no skirt protector* is useful unless it is one having a rib of vulcanized rubber attached to the lower edge of the facing itself, which was the thing patented first by De Forest some years before her patent, and a modified form of which was patented by Day afterwards, and which is the subject of this suit.

Day's protector is composed of two parts—one of which is a strip of "enameled cloth" of any color required, not differing from the Morrison protector in any particular; and the other is a rib of vulcanized rubber of peculiar form attached to the lower edge by stitches. The upper part constitutes the facing which protects the dress from moisture as far as it reaches, and the lower part protects the facing from abrasion. The facing alone would not *now* be used, because it would wear out too soon, nor would it be used if it were fluted as the patent requires. Fluting

does not remedy the difficulty, nor tend to remedy it. The remedy is in the rib of rubber which De Forest invented and Day modified; and now Macdonald swears that the De Forest thing is her protector, and she produces it as Exhibit B, and calls it her invention. As a specimen of pure impudence and mendacity, see her testimony, as follows (p. 76 of Record):

"Cross-Int. 7. What finish does a strip of waterproof "material *require* on its lower edge to insure wear as a "protector?

"A. A band of india rubber cemented to the edge, as "SHOWN IN EXHIBIT B, MACDONALD PROTECTOR, will finish "the edge and insure wear.

"Cross-Int. 8. Would a strip of waterproof material "without such band cemented or vulcanized to the edge "be a skirt protector, in your opinion; if not, why not?

"A. It depends upon what that waterproof material is; "if it was a straight piece of enameled cloth like 'Defend-"'ants' Exhibit Morrison Skirt Protector,' with a white "back and no finish on its lower edge, *it would not be a* "*skirt protector*, because if sewed on as a protector should "be, having the lower edge a trifle below the lower edge "of the dress skirt, the lower edge *being unfinished would* "*fray or ravel out* and present an unsightly appearance, "and it would be impracticable, and no person would dis-"figure themselves with such a *ridiculous device*."

Of course, the thing shown and described in the patent is that very "ridiculous device," except that it is plaited, which makes no difference in the "raw edge" and white back.

The case proposed in these questions was simply a plain strip of india rubber cloth, a much better material than enameled cloth.

And at Q. 14, after evading the issue for a page, she says that "Exhibit B would no doubt be a skirt protector "while it lasted, but being minus the thick edge it could not last long." But she also insists that the reason why it would be a skirt protector at all is that the cloth composing it is cut *bias*, and is composed of a *peculiar kind* of material lettered A; and when she is brought to compare defendants' protector, having the india rubber vulcanized rib removed from it, with the Morrison protector, the only difference between them that she can find, and the only

difference in fact, is that the cloth of the Day protector is dyed black, whereas it is dingy white in the Morrison; otherwise they are exactly the same. But of course, her patent not only does not describe making the enameled cloth black, but on the contrary, she swears that the only enameled cloth that she knew of when she obtained her patent had white backs.

(See Cross-Int. 36–40.)

Her witness Bowden had been instructed, no doubt, to say that enameled cloth could not be used as a skirt protector, for the purpose of destroying the testimony of those who had proved its use, and he so swore; but when he was confronted with the fact that it was described in her patent, he then thought it would be covered by the patent.

(See Qs. 36 to 39, p. 64.)

He was called upon to define a skirt protector under cross-examination, and the two definitions already sworn to by the complainant, the first in the Patent Office, and the next one in the Blackmer case, were offered to him for his acceptance or refusal, and the following is the record (p. 59):

"Cross-Int. 16. Don't you understand that any water-
"proof fabric or material that will protect a dress or dress
"material from wearing or moisture is a dress protector?
"(Objected to because Defendant's Exhibit 'Morrison
"'Protector, 1859,' is a piece of water-proof fabric
"which might have been and perhaps was used as
"a facing for the OLD FASHIONED UNGORED OR STRAIGHT
"SKIRTS OF THOSE DAYS, AND IN THAT CASE MUST
"HAVE BEEN BOUND IN WITH A NON-WATER-PROOF
"BRAID OR BINDING, which, of course, is folded around the
"lower edge, binding it to the dress material and making
"it a facing, which the braid and binding would be un-
"protected and soak up dirt and moisture.)

"A. I should not think that a dress protector which did
"not project below and protect the braid would be a
"sufficient protector, neither would *an article with a raw*
"*edge*, in my estimation. Even if of a waterproof ma-
"terial, I do not think it would be a merchantable article."

In respect to the first definition he said that "An article with a 'raw edge' would not be a sufficient protector, and would not be merchantable, not knowing that the patentee had made this *raw edge*, the very point of distinction in her Patent Office application; and when the 17th question was put to him (which quoted the complainant's own definition in the other case), he hesitated, and then the complainant quietly walked behind him and whispered "Yes" to him, which led to her denouncing the Examiner, and breaking up the examination, because he put down that fact upon the record as requested. When this witness came again, the same question was asked him, and he answered: "It is" (p. 82), and then the De Forest patent and drawing were shown him, and he was compelled to admit that Fig. 4 of the drawing showed a skirt protector, being seven-eighths of an inch wide, having a rubber rib vulcanized to the bottom edge, and described as projecting below the edge of the dress for the purpose of protecting it. This he did very reluctantly; but having sworn under the dictation of the complainant herself the width had nothing to do with the question so long as the water-proof protector projected below the bottom of the dress, there was no alternative but to make this obvious admission. He also swore that there was no such thing in the market as a plaited or fluted water-proof protector; that he never saw an enameled cloth water-proof protector made *according to the complainant's patent* in the market; and that he did not know of any practically successful skirt protector for use on the street to-day which has not this rubber rib on the lower edge of it (Cross-Q. 71, p. 70). This witness repeated like a parrot on all occasions that he understood the patent to cover any skirt protector of water-proof material however it was made, which was the lesson he came to recite; but of course he had to discriminate against this definition by excepting out of it "enameled cloth," the only thing patented by the complainant; so that according to him Macdonald invented about the only thing which could not be a protector.

The general result of the facts is this :

1. Plain strips of enameled cloth were sold on the market before 1860 as skirt protectors, and used as such. Macdonald used them in 1865 to 1868 in four dresses, and others were so using them in Lowell.

2. In 1873 Macdonald attempted to get a patent for skirt protectors generally and failed, and then took a narrow patent for a fluted one, which is of but little value. She swears that if made of the only material specified in the patent it is " impossible."

3. Her patent was sustained for this narrow claim in the Blackmer case against a " fluted " protector.

4. The De Forest & Day protector came into use and drove out all other kinds from the market ; so much so that Macdonald's witnesses swear that there is no "*practi-*" *cally successful skirt protector for use on the street to-*" *day which hasn't the rubber rib on its lower edge*" (p. 70, Cross-Q. 71).

5. Under these circumstances Macdonald began to infringe the De Forest patent, and to sell the protectors under the name of the " Macdonald Protector," shown in the case as an Exhibit, J. H. T., Notary, and to sue the owners of those patents as infringers of her patent, which performance as a specimen of pure impudence is not to be excelled.

6. The owner of the De Forest patent sued the manufacturers for Macdonald's infringement and stopped them (p. 312).

7. But in this case the Court held that De Forest's protector, whose patent was seven years older than Macdonald's, and Day's, who had a patent for modifying De Forest's, were infringements of her patent, and the sale of their goods has been stopped ; although it is not denied that their improvement is simply adding a strip of vulcanized rubber to the Morrison protector in use before 1860.

Errors.

I.

The Court erred in deciding that infringement was proved. Whereas in the opinion itself his Honor cites the only testimony on the subject, which did not touch the question of infringement at all, but only proved the purchase of a "Day" skirt protector; while the expert proof was the contrary.

II.

The very question whether that piece of plain rubber cloth, protected by a rib, was an infringement of her patent, depended upon the construction given to her patent; and it was error to construe it more broadly than its terms. The error seems to be too plain to admit of discussion.

III.

The patent was granted in the Patent Office only in consequence of the patentee's withdrawing the claim to skirt protectors generally, and limiting herself to her peculiar form. Even if the rules of construction permitted the claim to be enlarged beyond the specific form described in the patent and *specifically claimed*, this controlled her.

IV.

And, moreover, the patentee herself and her witnesses swore that if the protector were constructed as specified in her patent—that is, of *enameled cloth*—it was simply impracticable, which, although it was false swearing, yet was sufficient for the purpose of defeating her patent when she swore to it herself. No doubt it is true that an enameled cloth is a practical skirt protector, as she

swore it was in the Patent Office, as long as it lasted, but not so good as the india rubber cloth; but she cannot be permitted to avoid anticipation by swearing that the very thing patented could not operate, and therefore, *could not have been used;* and at the same time swear her invention behind De Forest and others by saying she *used* that very inoperative device herself before their patents. Judge Lowell does think this sort of swearing rather "suspicious," but relies upon Judge Shepley as an authority for holding it effective for both its objects. Judge Shepley's does not refer to this question.

V.

But if her patent covers a plain strip of enameled cloth, then the testimony is conclusive that for many years that kind of protector had been in common use, and she herself proves it in respect to her own use for several years on four dresses, and it is not less a strip of plain cloth because its lower edge is reinforced by a rib, patented before her patent.

The judgment should be reversed.

EDW. N. DICKERSON,
Counsel for Appellants.

SUPREME COURT OF THE UNITED

No. 182

JOHN SHEPARD, HENRY SHERRILL AND
GUSON, AS SHEPARD, SHERRILL AND

Appellants,

v.

EDWARD C. CARRIGAN, ADMINISTRATOR OF
M. MACDONALD, DECEASED,

Appellee.

BRIEF FOR APPELLEE.

Supreme Court of the United States.

IN EQUITY.

No. 123.

JOHN SHEPARD ET AL., APPELLANTS,

v.

EDWARD C. CARRIGAN, ADMINISTRATOR, APPELLEE.

BRIEF FOR EDWARD C. CARRIGAN, ADMINISTRATOR OF HELEN M. MACDONALD, DECEASED, APPELLEE.

The patent here in suit has had a somewhat remarkable history, having been in litigation in four different suits. Five decisions in its favor have been given, there being none of an adverse character. Of these decisions, one was rendered by the Commissioner of Patents upon an interference proceeding; one by the late Judge Shepley; the next, a prelimary injunction against the present defendants, by Judge Lowell; the fourth, a preliminary injunction by Judge Blatchford; and the fifth by Judge Lowell, it being the final decree now before this court. The record in the interference case and that in the suit before Judge Shepley, namely, Macdonald *v.* Blackmer, are made a part of the present record. The opinions of the Commissioner of Patents, of Judge Shepley and of Judge Blatchford are printed at the end of this brief.

The patentee, an unmarried woman, now dead, carried on

this long battle in defence of her invention, under the great disadvantages, as appears from the evidence, of poverty and inexperience. The patent was originally drawn by herself with the help of a friend, no solicitor being employed; and in the present case the examination and cross examination of witnesses on the part of the complainant were conducted by the patentee alone, without the assistance of any counsel. Moreover, no expert testimony was given in her behalf. The defendants, on the other hand, in this suit as well as in that against Blackmer *et al.*, were represented by able counsel; and in the present case, they are aided by the ingenious argument of an experienced expert.

In spite of these disadvantages, which have resulted in a meagre and fragmentary presentation of the complainants' case, it is submitted that it is plain from the record, especially when read in connection with that of the suit against Blackmer, that there are ample grounds to support the decree from which the present appeal is taken.

The Invention described in the Patent in Suit.

The invention described in the patent of Macdonald, here in suit, is a skirt protector; that is, something to be attached to the lower part of a woman's dress, and to project slightly below it, in order that the protector may be interposed between the dress and the pavement, the object being to save the dress from the moisture and dirt of the streets. It is plain that such a device, in order to be of any real use, must possess certain qualities of which the following are the most important: —

(*a.*) It must project below the dress; for if merely even with the lower edge of the dress, nothing would be interposed

between the dress and the pavement, and there would be no "protection."

Vide Rec. pp. 60, Cross-Int. 16; 220, Int. 10; 221, Cross-Int. 4; 222, Cross-Int. 8; 227, Int. 11; 242, Int. 8.

(*b.*) It must be waterproof; for otherwise, the protector would become soaked with mud and water, which, by capillary attraction, would be communicated to the dress.

Vide Rec. p. 245, Cross-Int. 38.

(*c.*) It must be noiseless; a skirt protector which makes a rattling sound upon the pavement or sidewalk is so objectionable as to be of little, if any, value.

Vide Rec. p. 23, Int. 12; p. 233, Int. 28.

(*d.*) It must not detract from the appearance of the dress; if unsightly or conspicuous it would be impracticable.

Vide Rec. 76, Cross-Int. 8.

(*e.*) It must be flexible, to adapt it to the shape of the skirt.

It is also desirable that the protector should be durable; but this is not absolutely necessary, for if the protector were cheap, so that it could be renewed at a small cost, it would be valuable, even though it did not last as long as the dress.

The protector invented by Miss Macdonald fulfils all of the above conditions, including that of durability.

Vide Rec. p. 161, Ints. 9, 10.

It was, moreover, as will presently be seen, the first practicable protector ever made by any one. There had been

some attempts to make a protector before the date of her invention; but they satisfied few, if any, of the requirements just stated, and were in fact nothing more than "abandoned experiments."

The Macdonald patent is printed on page 11 of the Record.

The patent says: —

> My invention relates to protectors for the lower edge of dresses and other garments, and consists of a band or strip of fluted or plaited fabric, either waterproof itself, or covered or bound with any waterproof material. . . . Heretofore, skirt protectors have been made of a plaited or fluted strip of "wiggan," or other fabric stiffened with starch, which, upon becoming wet, gets limp, loses its shape, and absorbs the dirt, besides being objectionable on account of the harsh scraping noise it makes upon the pavement. By my improvement these objections are overcome. The waterproof protector preserves the lower edge of the dress from all moisture on the ground, retains its rigidity and proper shape, giving a graceful hang to the skirt, and can easily be cleaned.

The single claim of the patent is as follows: —

> As a new article of manufacture, a skirt [facing or]* protector, having a fluted or plaited border, bound with or composed of enamelled cloth or other waterproof material, substantially as and for the purpose set forth.

Before considering the devices set up by the defendants as limiting the complainant's invention, the meaning of the words "facing" and "protector" must be noticed. In the art of dressmaking "protector" is a new word, because the thing itself is new. There were no skirt "protectors" until the Macdonald invention was made. Facings, on the other hand, are as old as dresses themselves. A facing is a strip of some fabric, usually cambric, sewed to the inside of and

*These words were disclaimed about a month after the patent issued.

around the lower part of a dress skirt, *not* projecting below the skirt. The object of a protector has already been stated. The purpose of the facing is to give stiffness and solidity to the dress and to make it hang well. A facing is an integral part of a dress, and no dress is made without it. A protector is something added to an otherwise complete dress, and the use of a protector does not dispense with that of a facing.

Vide p. 181, Cross-Ints. 46, 47; p. 220, Int. 11; p. 164, Int. 32; p. 165, Ints. 41–43; p. 168, Cross-Int. 40; p. 243, Ints. 27, 28.

One of the witnesses, a dressmaker, says: —

"I never knew a facing to extend below the bottom of a dress; it would not, in my opinion, be a facing. It would be a useless article on a dress." (Rec. p. 245, Cross-Int. 39.)

When Miss Macdonald made her invention, a protector being practically a new thing, the words "protector" and "facing" were not discriminated, and in her claim she included a facing or skirt protector. About a month after her patent was granted, namely, Nov. 4, 1874, she disclaimed a facing, limiting the claim of her patent to a protector.

This matter of skirt facings and skirt protectors is a perfectly plain one, and would scarcely require a moment's notice were it not that the defendants have sought by confusing the words to make a similar confusion between the things themselves, with the ultimate object of limiting the Macdonald patent for a skirt protector by preëxisting skirt facings, which were intended and used for a different purpose and are indeed incapable of use as skirt protectors. This attempt is not made for the first time in this case, the same

defence having formed an element in all the litigation on this patent. In the interference case with Chase, the Commissioner, in his opinion, said: —

> Chase's attorney makes a useless attempt to confound skirt facings with skirt protectors. These articles are entirely distinct in form, and are used for a different purpose. Enamelled cloth has been used for the former, but there is nothing in the record to show that it has been used for protectors.

In the case against Blackmer, JUDGE SHEPLEY said (after quoting the claim of the patent): —

> I see no reason to doubt that she was the first and original inventor of this article, as distinguished from a skirt facing, which is an entirely different article, and from a skirt protector, which, being made of wiggan, or other similar material, was substantially useless for the purpose, as compared with the complainant's invention.

The distinction between a "binding" and a protector is equally clear. A binding is a strip of braid used for the purpose of finishing a dress. It may be sewed either to one side of the edge of the dress or around the edge and on each side of it.

Rec. p. 283, Cross-Ints. 7 and 8; p. 234, Int. 32.

One of the defendants' witnesses says: "A binding is a thing that prevents the edge of cloth from ravelling." (Day, Dep. Cross-Int. 44, Rec. p. 32.)

A protector is well defined by one of complainant's witnesses (page 59), as "an article to protect a portion of the facing and braid, also a portion of the dress, from wear, or being soiled or wet by coming in contact with the sidewalk or street."

As before stated, it is to be distinguished from a "binding"

and from a "facing," the latter being a mere lining for the edge of a dress, both in function and mode of attachment. The facing and binding are part of the dress. The protector is a supplementary device attached to the finished dress which protects the facing and binding as well as the body of the dress.

The Date of the Macdonald Invention, and its Reduction to Practice.

The idea of making some sort of a skirt protector first occurred to Miss Macdonald in 1854, when she began to wear long dresses, or soon after (p. 248, Int. 14; p. 95, Int. 7).

In 1861 long dresses were commonly worn on the street as well as indoors, and in that year Miss Macdonald conceived her invention substantially as it was afterward patented, though many experiments were made by her before the invention was perfected. She says (complainant's evidence in reply, Record, p. 248, Int. 15): —

> It was so completed in my mind that I could and did make one and apply it to a dress in December, 1861; and (Ints. 22, 23) I had one or more of those dresses in my possession — dresses with protectors on — until the summer of 1869. I ripped the last one out in 1869 to gore the skirt; the others, I presume, found their way to the rag-bag.

Complainant's Exhibit 22, in the Blackmer case, shows the skirt protector as she made and attached it to a dress, in December, 1861.

Mary B. Arlen testified (Record, p. 99) in the interference case that in 1863 she saw a dress skirt, the property of Helen M. Macdonald, which had upon it a

waterproof facing, affixed to the lower edge of the skirt *as a protector*, said facing being composed of enamelled cloth.

At the time of the interference proceedings, as has been said, no discrimination had been made between the words "facing" and "protector," and therefore Arlen's testimony is not to be prejudiced by the fact that she, or rather the person who put the question to her, spoke of a facing used as a protector. On this point, Miss Macdonald testified on cross examination in the present case as follows (Record, p. 88) : —

Cross-Int. 78. Did you know then [at the time of the interference proceedings] as much about what you had done in making your invention as you do now?

Ans. Yes; but I didn't know so well what to call the thing I had invented; neither did my witness, Mary B. Arlen, because in her evidence she called the article which she saw me wear, and which was a skirt protector, a skirt "facing." Now, I knew at that time that the article I had invented was not a facing; that it was entirely distinct from a facing, and that it was to be sewed into a skirt over the facing; that it was entirely different from a facing, and that it served an entirely different purpose on a dress from a facing; yet when I drew my papers for the Patent Office, I knew no better than to call it a skirt protector or facing, and, as the record will show, afterwards disclaimed the word "facing." I might have said, and ought to have said, I claimed a waterproof skirt protector, which would have covered everything and saved much trouble and annoyance; but I did not know enough at that time to call those things by their right names, although I knew full well they were different and used for different purposes; and I dare say that that was the case with my witness, Mary B. Arlen, who testified in my behalf and spoke of this thing as a skirt facing.

So far, then, we have the testimony of Miss Macdonald and of one corroborating witness to the effect that she had substantially made her invention as early as 1863 ; and, inas-

much as no evidence is offered by the defendants to contradict this testimony, and no attempt is made to attack the credibility of these witnesses, it must be taken as an established fact that by the year 1863 the Macdonald invention was substantially completed. This is a matter of some importance in the case, as will presently appear.

See also Record, p. 95, for Miss Macdonald's testimony in the interference case.

She had no money with which to apply for a patent, no one to assist her in doing so (p. 250, Int. 28; p. 261, Cross-Int. 134), and the invention was not completed for four or five years. When asked (Record, p. 257, Int. 105) why she put the protector, devised by her in 1861, upon more than one dress, she replied: —

> To carry my experiments as far as I could in order that I might know just how it would work as a protector. (Cross-Int. 108.) I was experimenting in order to understand fully the merits of the invention; also, I lacked means to have the invention patented at that time. (Cross-Int. 109.) Wearing it upon one or two dresses did not really give me an opportunity to judge of its merits, and as I said before, I lacked means to have my invention patented. (Cross-Int. 111.) In experimenting I sometimes varied the protectors in width; also I covered them each one differently in order to know which would be the best way. . . . Sometimes I brought the covering over as a binding; sometimes I sewed them together, as in Exhibit 22; at other times I would let the covering come up higher than the top of the enamelled cloth, in order to attach it to the facing more conveniently. (Cross-Int. 114.)

During the years from 1861 to 1865, Miss Macdonald was living most of the time in Lowell, but wandering somewhat in search of employment, often out of work and struggling to support herself.

(Rec., p. 256.) *Cross-Int.* 96. Then you lived in Lowell from the fall of 1861 to (according to your recollection) until some time in 1864: can you state when it was, during those years at Lowell, that you were unemployed?

Ans. I was unemployed in December, 1861, and was unemployed at times very often while I was there; I cannot state any more distinctly than that. . . Between the years of 1861 and 1866 I made a great many changes. I did not stay long in one place, and I cannot tell you, with any degree of certainty, just where I was during any of those years, or just what I was doing.

(Page 262.) *Cross-Int.* 133. You have stated that you were out of employment many times while living in Lowell: can you state for how long a time you were out of employment, say in the longest of these intervals?

Ans. I cannot.

Cross-Int. 134. State as nearly as you can.

Ans. It would be impossible for me to do so with any degree of accuracy; and I may add that my experience in those years was the common experience of all friendless girls; that I had many changes and trials which are painful for me to think of, and which I have tried hard to forget.

The invention thus conceived of in 1861, and perfected by 1865, became practically useless in that year because short dresses then came into vogue. From 1861 till about 1865, long dresses were worn on the street as elsewhere; but in 1865, and for some years thereafter, short dresses were generally worn, and upon such dresses there is no occasion for a protector, because they do not touch the ground. There is no dispute about these facts, and they are fully stated in the Record, pp. 231, 234; Ints. 6, 7, p. 226; Int. 7, p. 241; Int. 7, p. 247.

In 1872, long dresses for the street having become fashionable again, and Miss Macdonald having obtained the necessary money, she resumed her experiments with that

form of her protector, in which enamel cloth is employed (p. 95, Int. 7; p. 250, Cross-Int. 28), and applied for a patent. She says: —

> I made application or began to, last of 1872, or first of 1873. I did it without consulting any patent lawyer or agent. I asked Mr. Geo. J. Carney to assist me in writing the letters, but he is not a lawyer nor a solicitor of patents, and I do not know that he ever had any experience in patent business until he kindly consented to assist me in making my application in the early part of 1873. (Rec. p. 263, Int. 151.)

There is also a peculiar and perhaps unique circumstance in this case, which would excuse Miss Macdonald's delay in applying for a patent, if any excuse were necessary; namely, that until the year 1872 there was no enamel cloth or other waterproof material in the market which was capable of bringing out all the advantages of her invention. Before 1872, the only enamel cloth to be had was very heavy, coarse in texture, and finished on one side only, so that the other side was white in color. It is well illustrated by "Defendants' Exhibit Morrison Skirt *Protector* 1859," as they euphemistically call it. There is no dispute as to this fact, and it is proved by numerous witnesses. (*Vide* Rec. p. 223; p. 233, Int. 22; p. 230; p. 238, Int. 3; p. 247, Int. 8; p. 249, p. 225, Cross-Int. 26–30.)

In making her first skirt protectors in 1861, Miss Macdonald used the lightest enamel cloth that she could find (Rec., Int. 17, p. 248), but it was heavy compared with that which she had made some years later, as will appear by reference to complainant's Exhibit 22 in the Blackmer case, which shows the 1861 skirt protector. (*Ibid.* and p. 249.) Miss Macdonald also testifies, and there is no attempt to

controvert her testimony on the point, that so late as the year 1873 no thin india-rubber cloth could be found in the market. Her evidence both as to enamel cloth and india-rubber, is partly contained in her answer to Cross-Int. 47, p. 83 of the Record, which is as follows: —

In 1873, when I applied for my patent, there was no waterproof material in the market, except enamelled cloth having a white back. I, being a dressmaker, knew very well what kind of waterproof fabrics were in the market at that time. I admit that india-rubber coats were made before that time, but the cloth out of which they were made was not for sale by the yard. These coats were made at india-rubber factories, and their seams vulcanized together before the cloth was vulcanized, otherwise the coat could not be put together. Women had not at that time begun to wear gossamer india-rubber cloaks, such as they now wear. These articles, I think, were never made in this country till 1875. I think the first one I ever saw was in 1875; that was imported. There was no black india-rubber cloth in the market in 1873, and I think the india-rubber coats that were on sale at that time were imported. If there had been any india-rubber cloth in the market in 1873 I would have made my model out of it, and not employed common enamelled cloth with a white back, which I had to conceal.

As implied in this answer, Miss Macdonald had not caused to be made a new kind of enamel cloth when she made application for a patent, but at that time she was making experiments in this direction, and she procured the new and improved kind of enamel cloth before her patent issued. She says: —

While experimenting with enamelled cloth skirt protectors in the winter of 1872–3, with a view to obtaining a patent, I used the common enamelled cloth like defendants' Exhibit Morrison Skirt Protector to illustrate the article I wished to patent, simply because there was no other waterproof cloth in the market at that time.

The uncertainty of obtaining a patent prevented me from ordering suitable material made. In other words, I was compelled to make my first models for the Patent Office out of this coarse, heavy enamelled cloth for the want of a more suitable material. At that time the public had never heard of such a thing as a skirt protector. In August or September, 1873, and when my prospects for obtaining a patent were good, I sent one yard of alpaca to the Taunton Oil Cloth Company, with instructions for them to waterproof it. They executed the order successfully, and returned the goods to me by mail; and I here state on oath that I believe that one yard of alpaca was the first cloth that was ever rendered waterproof for the purpose set forth. . . . Out of this one yard of waterproof alpaca, which is illustrated in Macdonald Exhibit E, E. B. Hagar, Sp. Ex., I made samples of waterproof skirt protectors, which I sent to the Patent Office in a letter dated Oct. 2, 1873. . . . Soon after I sent fifty yards of alpaca to the same company, which they waterproofed and returned to me about the twenty-seventh day of October, 1873. . . . It is out of this lot of goods — if fifty yards can be called a lot — that I commenced to manufacture skirt protectors for the market; and so great was the demand for these goods that I sold five thousand dollars' worth, in the short space of six or seven months, to one house. (Rec., p. 71.)

It is well settled that mere delay on the part of an inventor to patent a perfected invention cannot prejudice his right to a patent, for there is no provision of the statute and no principle of law which has this effect.

Ryan *v.* Goodwin, 3 Sumn. 314.
Reed *v.* Cutter, 1 Story, p. 600.
Fisher, Com. in Woerd *v.* Bacon, Com. Dec. 1869, p. 16.

This is true even when a subsequent inventor has applied for and obtained a patent before the application of the prior inventor; *a fortiori* is it true when, as here, the question

is not between two inventors, but as to the validity of a patent. The late discovery, therefore, of a thin enamel cloth, the employment of which added greatly to the value of the Macdonald invention, is here mentioned, not as a necessary excuse for her delay in applying for a patent, but merely as a part of the history of the case. The defendants, it is believed, do not assert that the invention was incomplete until the thin enamel cloth was produced. At all events, such an assertion could not be maintained, for it is elementary that there is no invention in using an improved article for the same purpose to which it has already been applied in its unimproved condition. (Buckan *v.* McKesson, 18 Blatch. 485.)

The defence of public use is set up in the answer, but little reference need be made to it here, as it is unsupported by evidence. The fact is, that the only Macdonald skirt protectors used before her application for a patent were those which she used on her own dresses experimentally. On page 75 of the Record she says: —

> I firmly state that I never allowed nor knew of the use of this article by any other person than myself prior to my application for a patent, and I so stated in the original case of Macdonald *v.* Blackmer, page 137, direct interrogatory 26.

No evidence is offered to contradict or qualify this assertion.

In the interference case, the Commissioner remarked on this point as follows: —

> Chase also insists that Macdonald should not be allowed a patent, on the ground of abandonment. This conclusion can only be arrived at by an unwarrantable distortion of the plain meaning of Macdonald's testimony. She testifies that at the time she made this invention

others had used waterproof, but nowhere does she say that waterproof protectors were then used.

A summary of this part of the case is as follows: —

Miss Macdonald conceived the invention in 1861, and completed it, so far as the materials then in existence would permit, and far enough to make it a practically successful and patentable article in 1864 or 1865. All the time from 1861 to 1873 she was poor and friendless. In 1865, short skirts took the place of long skirts, and there was no use for skirt protectors until 1872. In the latter part of 1872, Miss Macdonald made more experiments with enamel cloth, and early in 1873 she applied for a patent. There was no material in the market entirely suitable for a skirt protector until Miss Macdonald procured such a material to be made in 1873, after she had applied for a patent, but while her application was still pending; and she sent to the Patent Office, before her patent issued, samples of skirt protectors made of the new material.

Miss Macdonald's poverty, friendlessness and inexperience, together with the fact that it was not until the year 1872 that any material capable of bringing out all the benefit of her invention was in the market, would excuse her delay in applying for a patent, if any excuse were necessary; but no mere delay raises a presumption of abandonment, even though it be unexcused.

Some attempt has been made to argue that there was an abandonment of her invention by Miss Macdonald.

In considering this question it should be borne in mind that the provision of the statute with regard to it is not that provision which is particularly designed for the protection of the public. That clause in the statute which is intended for

this purpose is the one which provides that a patent shall issue to a first inventor only in case his invention has not been "in public use or on sale for more than two years prior to his application."

This period of two years is the limit fixed by the statute within which a first inventor shall have liberty not only to delay his application for a patent, but even to allow his invention to go into public use and to be on sale. The abandonment clause in the statute is therefore neither needed nor intended to protect the public or subsequent inventors. It is inserted in the statute because it would be manifestly absurd that an inventor who had once voluntarily given his invention to the public should afterward be permitted to reclaim it. It was to prevent this contingency that the abandonment clause was inserted, and it is for this object that it has been applied by the courts. Therefore it is that abandonment is regarded by the courts as an "*ill-favored* finding," and it has frequently been held that abandonment must be proved expressly, and will not be presumed.

Jones *v.* Sewall, 3 Cliff. 563.
U. S. Rifle & Cartridge Co. *v.* Whitney Arms Co., 14 Blatch. 94, and cases cited below.

In Jones *v.* Sewall, Judge Clifford said: —

Abandonment or dedication of an invention to the public, being in the nature of a forfeiture of a right, is not favored in law, and Mr. Justice Nelson decided that such a defence could not be sustained unless the acts of the party invoked for the purpose were corroborated by some declarations manifesting such an intention. . . . No one but the inventor is competent to abandon his invention to the public. His acts and declarations, if explicit, are sufficient for the purpose, or he may accomplish the same end by continued acquiescence in the act of

others, of which it appears that he had knowledge ; but the proof of knowledge and acquiescence must be beyond all reasonable doubt, as every presumption is the other way. McCormick *v.* Seymour, 2 Blatch. 235.

In the case of Birdsell *v.* MacDonald (6 O. G. 682), Mr. Justice Swayne, said : —

> The objection rests upon the principle of forfeiture, and is not to be favorably regarded. Every reasonable doubt should be resolved against it.

It follows, therefore, that, in the language of Judge Shipman, "Lapse of time *per se* constitutes no abandonment."

In Russell & Erwin Co. *v.* Mallory (10 Blatch. 140), Judge Woodruff also said : —

> Lapse of time does not *per se* constitute abondonment. It may be a circumstance to be considered. The circumstances of the case, other than mere lapse of time, almost always give *complexion* to delay, and either excuse it or give it conclusive effect. The statute has made contemporaneous public use, with the consent and allowance of the inventor, a bar when it exceeds two years. But in the absence of that and of any other colorable circumstances, we know of no mere period of delay which ought *per se* to deprive an inventor of his patent.

This passage is quoted with approval by Benedict J., in the case of Andrews *v.* Carman, 13 Blatch. p. 327.

From the principles thus laid down in the foregoing cases, it follows, as was said by KeKennan, J. (McMillin *v.* Barclay, 5 Fish. p. 199) : —

> This [abandonment] must result from the intention of the patentee *expressly declared* or *clearly indicated* by his *acts*." In this case, the learned judge went on to say : "There is certainly no evidence in the case of any express declaration of the patentee to that effect ; and if the lapse of years between the date of his application and of

his patent, and his own conduct, can be fully explained upon any other hypothesis, they ought not to be imputed to an intention on his part to abandon his invention.

If we turn to authorities, it will be found that very long delays have been held not to raise the presumption of abandonment, — a delay of eight years, for instance, in the case of

Smith *v.* Goodyear, Dental Vulcanite Company, 93 U. S. 486.

In the case of White *v.* Allen (2 Cliff. 224), it was held that a mere apprehension on the part of the inventor that he and his brothers would be discharged from employment if he applied for a patent, excused a delay of five years.

In Colgate *v.* The Western Union Tel. Co., 15 Blatch. p. 393, the first application was made in 1849, and a patent was not obtained until 1866. From October, 1849, till December, 1858, the inventor made no effort to renew his application, and for aught that appears, did nothing in the matter. He was poor, and therefore the Court held that his delay was not evidence of abandonment.

In Johnsen *v.* Fassman (1 Woods 138 and 5 Fish. 471), there was a delay of nine years between an application for a patent, and an appeal from its rejection. During four of those nine years the inventor was a citizen of a State which was in rebellion; but no reason seems to have been given for his delay during the other five years. The Court held, however, that there was no abandonment, although between his application and the final granting of his patent, nine years later, several patents for substantially the same inven-

tion had issued to the other inventors. Other authorities might be cited if they were necessary.

It is submitted that there is not in this case the slightest evidence of abandonment. On the contrary, the plaintiff said: —

"It was always my intention to make application for a patent when I got able or had the money, and when such a thing was needed in the market."

(Rec. p. 273, Int. 247); and there is no opposing evidence.

The Prior Devices set up in Defence.

Having ascertained the requisites of a skirt protector, we proceed to consider how far the devices set up by the defendants fulfil these requisites. There are but four of them, the Morrison Skirt Protector, so-called, which dates from 1859, the Lucinda Humphrey patent of April 22, 1862, the Mackee patent dated Jan. 16, 1865, the De Forest patent, dated Jan. 15, 1867.

The Morrison skirt protector is alleged to be shown in defendants' Exhibit Morrison Skirt Protector, and Exhibit Douglass Skirt Protector, and in defendants' Exhibit Protector Samples No. 1.

It is a piece of heavy, coarse, green enamel cloth, such as was used by carriage makers, finished on one side only, being white on the other. It was undoubtedly used as a skirt facing, but not as a protector, in the proper and recent sense of the word.

It is unnecessary to analyze the evidence as to the use of this crude article. Judge Lowell summed it up as follows: —

It is not proved to my satisfaction that it was used as a protector in the present sense. I think it was probably made into facings. The

evidence of the witnesses who sold it is not and could not well be very distinct upon this point, as they were none of them women or dress-makers.

See also Record, p. 78, Cross-Int. 15, Macdonald Deposition.

The Lucinda Humphrey Patent has no bearing upon this case. It is for an oilskin pocket attached to the lower edge of a hoopskirt in order that the dress may be tucked into it, in case of rain. It is not in any sense a skirt protector, and is a foolish article which probably was never used. We make the following quotation from the Lucinda Humphrey patent:

The oiled silk or other material used as a protector is secured to metal loops, which I prefer to make of steel, and which hook into eyelets, or are otherwise attached on the bottom of the petticoat. It may be worn under the dress, out of sight, on ordinary occasions, and when desired, the wearer may tuck the bottom of her dress in a few minutes into the protector, and then proceed over wet or muddy ground, etc.

The Mackee patent, dated Jan. 10, 1865 (p. 54 of the Record.) This patent describes a facing, not a protector, composed of enamelled cloth, attached at its upper edge to a band of flexible linen cloth. The patent shows not only that the enamel cloth does not project below the lower edge of the dress, but further that "the lower edge of the waterproof band is to be sewed to the bottom of the dress, *and is to be protected by a band of braid c, stitched to the dress and the waterproof facing.*" The patent gives no direction as to the material of the braid *c*, and therefore it must be taken to be the only braid ever made or known for binding the skirts of dresses, which is of course of cloth or woolen, or some such fabric. (Rec. p. 283, Int. 11.) It

appears, then, that the Mackee patent describes a facing which was incapable of use as a protector; and this being plain, both from the specifications and the drawing, it is unnecessary to recapitulate the evidence on this point.

The man who first introduced the Mackee facing, as it was afterwards called, when Mackee patented it, was Mr. Churchhill, formerly a large dealer in dry goods at Boston. He sold immense quantities of this facing, and he testifies that it was sold for use as a facing, not as a protector; and it was known to the trade as such; Record, pp. 91, 92. The witness, Francis, also testifies that forty thousand or fifty thousand Mackee facings were sold chiefly about the year 1865. If these facings or any of them had been attempted to be used as protectors, it would have been easy for the defendants to have established the fact.

On the contrary, we have even from the *defendant's* own witnesses such testimony as the following: —

> *Cross-Int.* 17. Was it [the Mackee facing] bound to the dress with the skirt braid?
>
> *Ans.* That was the intention that we sold it for,
>
> etc.
>
> Rec. p. 40.

The Commissioner of Patents in his opinion in the Interference case thus disposed of the Mackee patent:

> No waterproof protector is shown or hinted at in this patent. Mackee has a waterproof facing which only extends down as far as the edge of the dress skirt, and uses braid for a protector."

Judge Lowell does not even allude to the Mackee patent in his opinion in this case.

The De Forest Patent.

The De Forest patent shows a rubber edge, but its date, 1867, is two years later than the date at which Miss Macdonald had completed her protector and there is no evidence in the record tending to carry the date of the DeForest device back of the patent. But even if it had preceded the Macdonald invention it would not have anticipated it.

The DeForest patent is merely for a binding; that is, it was intended to be an integral part of the dress. The function of a binding is stated (*ante*, p. 6). It should be added here that a binding goes all around the edge of the dress, whereas a protector usually does not (pp. 302, 303, Ints. 4 and 10; p. 304). DeForest's idea was to strengthen the ordinary binding which has always been used in dresses and other clothing by introducing a stiff rubber strip at the edge. He recognized that bindings at the bottom of long dresses wear out and become dirty. DeForest attempted to prevent this; he did not attempt in any way to prevent the body of the dress and the dress-facing from wearing out or from becoming wet and dirty; this was never done until Miss Macdonald introduced her skirt protectors into the market. Her protectors might be added to a dress having a DeForest binding, and each device would operate independently, and as the several inventors intended; the DeForest strip preventing the edge from wearing and becoming dirty, and the Macdonald protector performing a like function for the body of the dress and the facing.

It is clear that the De Forest "device" could not protect the dress. The patent states that the views in the several drawings are "enlarged," meaning that the portions marked

"*a*" are to be reduced to the size of "ordinary binding," and the portion marked "*d*" proportionately. This would give but a slight projection of the rubber edge below the binding, not enough to accomplish any useful purpose except the single one intended, viz., to protect the *edge* of the binding, and incidentally of the dress.

The witness Prince (Record, p. 164, Cross-Int. 34) testifies that even in a protector, which may and does extend back from the edge indefinitely, there should be a projection of not less than from a quarter to a half inch below the bottom of the dress.

The several drawings of the patent show clearly that DeForest had no idea whatever that any particular extension below the bottom of the dress was necessary or desirable.

Another fatal objection to the DeForest article, considered as a protector and not simply as a durable binding, is that it does not extend up on the inside of the skirt, as does the Macdonald protector. But it is just there that a protector is needed. When a long skirt drags on the floor, or sidewalk, it is not merely the edge that touches, but also, of course, a part of the inside of the dress above the edge. The DeForest binding, as he himself calls it, does not protect that part of the dress; in other words, it is not a protector, but a self-protecting binding.

Mrs. Flynt, a very intelligent and careful witness, testifies as follows. Record, page 302: —

Int. 9. Is it not necessary for a protector, in order to serve as a protection, to extend up inside of the skirt enough to cover the braid and that portion of the facing that drags?

Ans. It is. The skirt of a lady's dress wears out soonest inside the braid, and *an inch up on the facing on the back*, and a little ways on the sides.

DeForest in his patent says that his binding is formed by attaching the gum to "a ribbon, or strip of ordinary binding." The defendants' own witness, Young, describes an "ordinary binding" for skirts as a "braid made of worsted or cotton," about half an inch wide (Record p. 283 Cross-Ints. 8–12). This braid is, of course, bound around the lower edge of the dress, so that it would extend up inside of the skirt something less than half of its width; *i. e.*, something less than one quarter of an inch. But a protector, as has been shown, should extend up for an inch at least inside of the skirt, as the Macdonald protector does. It is plain then, for this, as well as for the other reasons stated, that the DeForest binding was a binding merely, and not a protector.

Another objection to this device was thus stated by Miss Macdonald (Rec. p. 72).

> I have before me two copies of the DeForest binding. The one in paper, put in by the defendants at an early stage of this case, the drawings of which, the accompanying specification says, are enlarged, If a piece of india-rubber was attached to a piece of ordinary binding, in any manner shown in these figures, and if it were only half as large as this drawing represents the article to be, it would disfigure and ruin the appearance of the dress and wearer, and in my opinion, no person lives who has used or seen this article used, although the patent is nearly thirteen years old.

There is not a particle of evidence in the case to show that the DeForest article was ever used, and this fact of itself is enough to show its want of value.

The Patentability of the Invention.

Little need be said on this branch of the case, and it is not believed that the defendants will dispute the patentability of the Macdonald invention. The Macdonald device, was, as

has been shown, an entirely new article; namely, something to protect the lower part of a woman's dress from wear, from dirt, and from moisture; and it was ingeniously calculated to fulfil the difficult requisites of a skirt protector, which are stated *ante*, pp. 2, 3. Such an article had long been needed, and unsuccessful attempts had been made to produce it. As soon as it was made, it was sold in immense quantities, and infringers appeared to copy it, and to contest the patent. The utility of the article, added to the fact that its want had long been felt, is sufficient proof of its patentability. The language of the Supreme Court in the case of Loom Company *v.* Higgins, 105 U. S. 580, is very pertinent to this case. Speaking of the device described in the patent there in suit, the Court say: —

> But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not for years occur in this light to even the most skilful persons. It may have been under their very eyes, they may almost be said to have stumbled over it, but they certainly failed to see it, to estimate its value, and to bring it into notice . . . Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit.

In the case of Washburn & Moen Mf'g Co. *v.* Haish 4 Fed. Rep. 900,

the Court said: —

> If there is any invention required, then the law will not attempt to measure its extent or degree . . . . . In the absence of any other test, the courts have seemed to assume that the fact of the acceptance of a new device or combination by the public, and putting it into extensive use, was evidence that it was the

product of invention; or, as one of the counsel for the plaintiff expressed it, "Utility is suggestive of originality."

In Pennsylvania Salt Manufacturing Company *v.* Gugenheim, 3 Fish, 423, the Court say: —

> The patentability of an alleged invention is in many cases most satisfactorily shown by its utility. In Webster, on subject matter 30, it is said, "The utility, then, of the change as ascertained by its consequences, is the real practical test of the sufficiency of an invention; and since the one cannot exist without the other, the existence of one may be presumed in proof of the existence of the other; whenever the utility is proved to exist in any great degree, a sufficiency of invention to support the patent must be presumed."

See also, Consolidated Valve Co. *v.* Crosby Valve Co., 113 U. S. 157.

INFRINGEMENT.

The Macdonald patent is printed at page 11 of the Record. The defendants' skirt protector is made in accordance with the Day patent (a patent subsequent to Macdonald's), printed on page 12 of the Record, and it is illustrated by complainant's Exhibit A of the present case. It is not denied that the defendants have sold this protector, the sale is proved (Rec. pp. 9, 56); and Judge Lowell so finds (Rec. p. 104). The only question, therefore, on this branch of the case is: Does the Day protector infringe the Macdonald protector? In answering this question, the first and most obvious consideration is the fact, already established (*supra* pp. 19–24), that the Macdonald patent is a *foundation* patent, and consequently entitled to the broad construction which such patents always receive. It is indisputable that there was no skirt protector in the market — that the very name

of the thing had no commercial existence — until Miss Macdonald made her invention (Rec. p. 58, Int. 11; p. 216, Int. 11; p. 223, Int. 18; and opinions of Shepley, Lowell and Blatchford JJ., *post*).

Skirt protectors of wiggan, haircloth, etc., had indeed been made, as she states in her patent, but they were worthless, and belong to the class of "abandoned experiments.' They lacked the one essential quality of a skirt protector, — they were *not waterproof;* and in addition, they were cumbersome and noisy (Rec. pp. 58, Int. 11; pp. 161, 221).

In the case against Blackmer, Judge Shepley said: —

> I see no reason to doubt that she was the first and original inventor of this article, as distinguished from a skirt-facing, which is an entirely different article, and from a skirt protector, which, being made of wiggan or other similar material, was *substantially useless* for the purpose, as compared with the complainants' invention.

Setting aside these "substantially useless" protectors, there was, at the time of the Macdonald invention, no skirt protector whatever in existence. Of the articles adduced by the defendant, the De Forest device only has any likeness to a skirt protector; and this (besides being impracticable and worthless, for the reason stated *supra*, pp. 22–24) cannot affect the Macdonald patent, which is for an invention completed two years before the date of the De Forest patent (*ante*, pp. 7–11). The Macdonald patent, then, is a foundation patent; the "substantially worthless" protectors which preceded Macdonald's invention serving not to limit its scope, but to emphasize its merit, as showing that the want which Miss Macdonald supplied was a real and pressing one. All foundation inventions have followed impracticable devices intended to effect the same purpose. The patent which

describes the first practicable device for the purpose in question is, of course, the foundation patent. (Morley Sewing Machine Company *v.* Lancaster, 23 Fed. Rep. 344.)

A foundation or primary invention is correctly defined by Mr. Walker (Walker on patents, § 359) as one which performs a function never performed by any earlier invention. A *secondary* invention is one which performs a function previously performed by some earlier invention, but which performs that function in a way substantially different from any that preceded it. Macdonald was the first to invent a practicable skirt protector; *i. e.*, something which, coming between the skirt and the pavement, affords a perpetual protection to the skirt from the moisture and dirt of the streets, without being so heavy, noisy or unsightly as to be impracticable.

Before leaving this subject, one or two papers in the "file wrapper and contents" of the Macdonald patent, bearing upon it, will briefly be noticed. In one of her letters to the commissioner of patents (p. 143 of the Record), Miss Macdonald says: "I do not claim that waterproof material has never been used before in dress facing." We call attention to this, simply to emphasize the fact that she says *facing* and not *protector*. Dress *facings* of enamelled cloth had undoubtedly been used before her invention; but she asserted, and the present complainants assert, and Blatchford, Shepley, and Lowell JJ., found that she was the first to invent a skirt protector, which, as Judge Shepley said, "is an entirely different article."

At page 149 of the Record there is a letter dated Oct. 30, 1875, from the Examiner to the Commissioner of patents, on the subject of a certain alleged invention in skirt protectors

subsequent to Macdonald's, for which a patent was asked. It will be observed that this letter was written more than a year after the issue of the Macdonald patent, and a year after her disclaimer was filed. It cannot, therefore, affect in any way the construction of the Macdonald patent, and is altogether immaterial to the issues of this case. Nevertheless, coming, as it does, from an examiner of the Patent Office, it is entitled to whatever weight the courts are in the habit of attributing to the *dicta* of Patent Office officials. The writer says that the Macdonald patent is not a foundation patent, but in stating his reasons for that view he shows that he had no ground for it, and that he did not understand the state of the art. He says: —

> Previous to the date of her application, a large number of patents had been granted for skirt protectors, involving the waterproof feature, those among the earliest being Lucinda Humphrey, April 22, 1862, No. 35,026; James A. Mackee, No. 45,840; and S. B. De Forest, Jan 15, 1867, No. 61,172; accordingly, Macdonald not being deemed a foundation inventor, etc."

The examiner did not then know, and, of course, had no means of knowing, that, as appeared in the subsequent suit upon the Macdonald patent, the Mackee patent, and the DeForest patent were both later than the Macdonald invention.

As to the Lucinda Humphrey patent, the absurdity of regarding it as in any sense an anticipation of the Macdonald patent has already been shown (*ante*, page 20). It did not even describe an article of continuous use, but a mere *pocket* designed to be used only in case of some emergency, and then by tucking the lower part of the dress bodily into it. This was not a protector, but a foolish, useless

pocket. Moreover, in this letter the Examiner makes no discrimination between *facings* and *protectors;* and he speaks of Macdonald's having limited her claim by erasing the word facing, when she was referred to the Mackee patent. This explains his conclusion that the Macdonald patent is not a foundation patent.

If facings and protectors be considered as one and the same thing, it is not a foundation patent. But facings and protectors are not the same thing; they do not discharge the same function or operate in the same manner (*ante*, pp. 4, 5).

The Examiner's opinion, then, as shown in this letter is based upon three misconceptions, (1) that the Macdonald invention was subsequent to the Mackee and DeForest patents; (2) that the Lucinda Humphrey article was a "protector" and a practicable protector; (3) that facings and protectors are the same thing.

We submit, therefore, that the Macdonald patent is a *foundation patent*, and as such, according to the well settled rule, entitled to receive a more liberal construction than patents for combinations of old elements, or for a mere improvement upon an existing article.

McCormick *v.* Talcott, 20 How. 403.
Railway Co. *v.* Sayles, 97 U. S. 554.
Clough *v.* Barker, 106 U. S. 166.
Consolidated Safety Valve Co. *v.* Crosby Valve Co. 113 U. S. 157.
Duff *v.* Sterling Pump Co. 107 U. S. 639.
United Nickel Co. *v.* Pendleton, 15 Fed. Rep. 739.
Potter *v.* Stewart, 18 Blatch. 565.
Amer. Bell Tel. Co. *v.* Spencer, 8 Fed. Rep. 516.
Same *v.* Dolbear, 15 Fed. Rep. 454.
Tilghman *v.* Proctor, 102 U. S. 757.

The Infringing Device.

The defendants' skirt protector (*ante* page 26), though essentially like that of the Macdonald patent, and operating in the same way and with the same result, does not have "a fluted or plaited border," and on this point it is believed that the appellants will chiefly rely.

It is clearly proved by the testimony, including that of the defendants' witnesses, that the fluting and plaiting of the Macdonald protector is of absolutely no consequence. The witness Day, the patentee of defendants' contrivance, testifies that the advantage of a plaited or fluted protector over a plain piece of enamelled cloth "is mostly confined to the simple fact that it is somewhat more pleasing to the eye" (p. 25, Int. 17).

Serrell, p 43, Int. 7, testifies that the "only effect of the Macdonald plaiting or fluting is to give an ornamental appearance, as shown in Fig. 2 of her patent, and increase the amount of cloth made use of."

Miss Macdonald, referring to this matter of plaiting, says: —

> In order to make this article a success, the form or style must be changed often. Indeed the trade is constantly demanding new styles or forms of this article, and I am of opinion that the form or style of this article can be changed or varied in hundreds of ways.
>
> Rec. p. 75.

The witness Bowden, who was a salesman of skirt protectors, being asked if the Macdonald patent described anything but a plated or fluted protector, said: —

> It [the patent in suit] does describe a fluted or plaited skirt protector, but bound with or composed of enamelled cloth or other water-

proof material. I consider the *style* of the protector immaterial, provided it is waterpooof.

Rec. p. 62, Cross-Int. 24.

At the time that Miss Macdonald applied for her patent, it was the custom to plait or ruffle the bottoms of dresses (Rec. page 311), and therefore she described her protector as being plaited or ruffled in order to show not that it must, but that it might so be made.

Construction of the Claim.

The claim of the Macdonald patent is as follows: —

As a new article of manufacture, a skirt protector, *having a fluted or plaited border*, bound with or composed of enamelled cloth, or other waterproof material, substantially as and for the purpose set forth.

This was the claim secured by Miss Macdonald to protect her in the exclusive control of a radically new invention which, as she foresaw, was to be of very great importance.

She had invented *Skirt Protectors*. Whether in any given case they should be plain or fluted depended upon the prevailing fashion or the particular style of the dresses to which they were to be attached. She showed in her application a gored dress elaborately trimmed. In such a dress a protector naturally would be of an ornamental character, that is plaited or fluted. Referring to her drawing she described in her claim what she there saw. Shall this incidental reference to a feature that is merely ornamental operate to deprive her of all benefit from the substantial invention which she made? There is no question that the Day pro-

tector embodies all that Miss Macdonald had invented or that she cared to protect.

It is certain that the prior existence of the Day protector would have been a complete answer to her patent, for there could be no patentable invention in plaiting protectors, or any other variety of dress goods. The Court would have said that the Macdonald protector was anticipated by the Day protector, if the latter had preceded it, ignoring the fact that "plaiting and fluting" had been employed as an ornament by her. In like manner we submit that the Day contrivance following the Macdonald should not be allowed to escape from her claim because of the incidental reference in that claim to the same ornamental feature.

To limit her claim to the embodiment of her invention in a single ornamental form would work very great injustice.

Such a harsh construction, under the decisions, might perhaps be made in the case of a narrow invention; but, it is respectfully submitted, such a construction is unprecedented in the case of a foundation patent.

On the other hand, precedents are not wanting for the construction here contended for, even with respect to narrow patents. In the case of Fetter *v.* Newhall, 17 Fed. Rep. 842, the patent in suit was for a drive-screw, and the claim was:

> A drive-screw having an angular thread of the character shown, *and a conoidal point*, the base of which is of the same diameter as the lower end of the shank with which it immediately connects.

The screw made by the defendant did *not* have a conoidal point, but nevertheless the Court held it to be an infringement of the plaintiff's patent, the conoidal point being an unessential, though specified, part of the claim.

In Mabie *v.* Haskell, 2 Cliff. 507, the claim was for a sectional shoe last of *three* sections. The Court held that this was not a claim for a combination, and that the defendant infringed by the use of a last of *two* sections.

A case very similar to the present one is that of Hammerschlag *v.* Scamoni, 7 Fed. Rep. 584.

The patent described a machine for waxing paper, in which a cylinder revolving in a bath of melted wax, carried the wax up and applied it to the paper as it passed over the cylinder; the paper passed beneath another heated cylinder with the plain surface of the paper next to it. This diffused the wax through the paper. A scraper to remove the surplus wax, and another heated cylinder to iron the paper, completed the essential features of the machine. The fifth claim was as follows: —

> The method herein set forth of waxing paper, consisting in spreading the wax upon the surface, heating the paper from opposite sides to spread and fuse the wax into the fabric of the paper, removing the surplus wax, remelting and polishing the wax upon the paper, substantially as set forth.

The defendant contended that he did not heat his paper from the opposite side. The Court said: —

> It is true that claim five speaks of heating the paper from the opposite side, to spread and fuse the wax into the fabric of the paper, and that in the plaintiff's patent the unwaxed surface of the paper is next to the heating cylinder, while in the defendant's apparatus the waxed surface is next to the heating plate. But the plaintiff's specification shows, and the fact is plain, that the object of maintaining the heat is to maintain it at the unwaxed surface of the paper, so as to draw the wax from the waxed surface through the body of the unwaxed surface, by reason of this melted combination and of the absorbing character of the paper.

And the Court held this claim to be infringed.

The fifth claim of the Hammerschlag patent was afterward in suit before Judge Lowell in the case of

Hammerschlag Mfg. Co. *v.* Wood, 18 Fed. Rep. 175.

Judge Lowell, referring to Judge Blatchford's opinion in the case just cited, said: —

He found that the invention was new and useful, and what he calls a pioneer and foundation patent, entitled to a very liberal construction. Similar evidence of the state of the art is given in this case.

The defendant's machine carried the web of paper through a bath of wax instead of passing it over a cylinder coated with wax, as in the patented machine. Judge Lowell said: —

I find, however, that the wax is spread in equalized portions and diffused by the defendant's machine; and, if the fifth claim of reissue 8460 is to have the broad interpretation which Judge Blatchford appears to me to give it, it is done in a substantially similar way. . . . I am myself of opinion that the claim may and should have this liberal construction.

Conclusive upon this point is the recent important case of Clough *v.* Barker 106 U. S. 166.

The patent in suit was upon a gas burner. The burner was connected with the supply pipe by a tube, This tube screwed into the interior of the burner at its lower end, and was screwed on the supply pipe by a thread cut on the interior of the tube. The burner was perforated around its lower end to permit the escape of some of the gas into a cup which was fitted tightly to the burner below the perforations, and surrounded the burner so as to direct the gas escaping from the perforation up to the flame. By screwing the

burner down on the tube the perforations were closed by the tube shutting by them. This regulation of the escape of the gas from the perforations necessarily required that the burner, and with it the flame, should be revolved in opening or closing the perforations. The second claim of the patent was for

> A combination of the bat-wing burner, perforated at the base, the surrounding tube, and the tubular valve for regulating the supply of external gas to the burner substantially as described.

The defendant's device had a burner with a perforated base, but instead of a tube screwing up into its interior to open and close these perforations the cup which surrounded was made to screw up and down on the outside of the burner over these perforations, so as to open and close them. This obviated the revolving of the burner and flame. It was held that this device infringed the claim above granted, and the Court said:

> Although in the Clough structure the burner and revolving tube revolved together in adjusting their position in reference to that of the tubular valve, so as to let in or turn off the supply of gas through the perforations, and although, in the Clough structure, the flame revolves by the revolution of the burner; and, although in the defendant's burner the revolution of the surrounding tube regulated the supply of gas from such perforations, and neither the burner nor the flame revolved, the defendant's valve arrangement must be held to be an eqvivalent for that of Clough to the full extent to which that of Clough goes; involving, perhaps, patentable improvements, but still tributary or subject to the patent of Clough.

See also:

Sharp *v.* Tift, 18 Blatch. 132.
Union Sugar Refinery *v.* Matthiessen, 2 Fish. 600.

Standard Measuring Co. *v.* Teague, 15 Fed. Rep. 390.
McWilliam Mfg. Co. *v.* Blundell, 11 Fed. Rep. 419.
Blanchard *v.* Beers, 2 Blatch. 415.
Coup *v.* Weatherhead, 16 Fed. Rep. 673.

The selection of fluting or plaiting, as has been shown, was purely arbitrary, and was due to the fact that at the time the patent was drawn, fluting or plaiting was the common, if not the general, manner of finishing the lower edges of women's skirts. The fluting or plaiting is a mere matter of form, universally practised by dressmakers, so that the phrase "having a fluted or plaited border," would have to the users of skirt protectors merely the force and effect of a superflous adjective.

This is the view of the patent taken by Blatchford and Lowell JJ. In the case against Blackmer, before Judge Shepley, this question did not arise, for there the defendants used a fluted or plaited article; but in the case before Judge Blatchford (Macdonald *v.* Seidenberg, 18 O. G. 193), the question did arise, and Judge Blatchford, following Judge Lowell's decision on motion for preliminary injunction, held that the patent was not limited by the claim to protectors having a fluted or plaited border. In his opinion he first quoted from Judge Lowell's decision as follows:—

> I understand that the fluting or plaiting is merely a part of the finish proper, and perhaps necessary when the skirt to be protected is made of a certain shape; unnecessary when it is of another shape. It seems to me that both of the parties took for granted in that case [the Blackmer case, before Judge Shepley] that a skirt protector not plaited would defeat the plaintiff's patent if proved to have been made before the date of her invention. I certainly so understood it in deciding upon the questions raised by the discovery of the DeForest patent.

Judge Blatchford then remarked: —

The defendant's article in the present case does not have a fluted or plaited border, but it is like the plaintiff's article in all other respects. I concur with Judge Lowell in not regarding the fluted or plaited border as essential in view of the state of the art prior to the plaintiff's invention in December, 1861.

Judge Lowell, upon a reconsideration of this case, when it came up upon final hearing, said: —

This is a somewhat nice question of construction, but I still think it the better opinion.

It is submitted that the ground taken by Judge Blatchford and by Judge Lowell is correct, that the patentee having been the first to invent a practicable skirt protector, is entitled to a broad construction of her patent; that the use of a fluted or plaited border to the exclusion of any other similar device is a mere matter of descriptive form, and that the defendants, having copied all the substantial part of her claim, and having taken the gist of her invention, must be held as infringers.

There is but a single class of cases where the omission of one element of a device, that element being specified in the claim, and the substitution of a different device, patentable or not, avoids infringement. These are cases where the patented invention consists merely in a *new combination* of *old elements;* and even in those cases the substitution of an element which is but a "colorable evasion" of the one omitted does not avoid infringement. The principal cases of this kind are the following: —

Gould *v.* Rees, 15 Wall. 194.
Prouty *v.* Ruggles, 15 Pet. 341.

Wicke *v.* Ostrum, 103 U. S. 461.
Railroad Co. *v.* Mellon, 104 U. S. 112.
Bridge *v.* Excelsior Co. 105 U. S. 618.
Hoffheimer *v.* Russell, 107 U. S. 132.
Gage *v.* Herring, 107 U. S. 640.
Fay *v.* Cordesman, 109 U. S. 408.
Water Meter Co. *v.* Desper, 101 U. S. 332.
Burns *v.* Meyer, 100 U. S. 671.

The rule laid down and followed in these cases of combination of *old* elements has been thought to operate somewhat harshly, even in such cases, and certainly no decision of this court has ever extended it to cases where a combination of new elements, or a new article, is the subject of the patent.

A patent for a new combination of old elements is of course always a very narrow patent, and for that reason such patents are strictly construed. The patent here in suit, so far from being a narrow patent for a combination of old elements, is a foundation patent, being for a new article: namely, the first practicable skirt protector ever made. As such it is entitled to a broad construction.

The cases establish this principle: When the patent is a narrow one, as for a new combination of old elements, it is not infringed if the defendant omits to use any one specified element of the claim, provided that he does not substitute a mere colorable evasion therefor.

But when the patent is a foundation patent for a *new article* or for a combination of new elements, the defendant does not escape infringement, if he takes any substantial part of the invention, even though he omits altogether one specified

element of the claim; and although he substitutes, for the element so omitted, a patentably different one.

We proceed to cite some of the authorities which establish the rule just stated.

The first case where the rule as to foundation patents was laid down is, it is believed, that of

McCormick *v.* Talcott, 20 How. 405.

The Court said: —

If he (the patentee) be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle and performing the same functions *by analogous means or equivalent combinations, even though the* infringing machine may be an *improvement of the original and patentable* as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different combination performing the same functions. The inventor of the first improvement [as distinguished from the inventor of the original article or machine] cannot invoke the doctrine of equivalents to suppress all other improvements which are *not mere colorable invasions of the first.*

The words underlined contain the rule which we have stated.

The doctrine of McCormick *v.* Talcott, was reaffirmed in the later case of

Railway Co. *v.* Sayles, 97 U. S. 556.

In the case of Fuller *v.* Yentzer, 94 U. S. p. 297, the Court said: —

Such an invention [a combination of old elements] if it produces a new and useful result, is the proper subject of a patent . . . but

the rights of a patentee under it differ in one respect from those of a patentee for an invention which consists of an entire machine or of a new and useful device, as the rights of a patentee, for a mere combination of old ingredients, are not infringed unless it appears that the alleged infringer made, used or sold the entire combination.

In the case of

Imhaeuser *v.* Buerk, 101 U. S. p. 655, the Court said: —

Equivalents may be claimed by a patentee of an invention consisting of a combination of old elements or ingredients, as well as of any other valid patented improvement, . . . but the term 'equivalent,' as applied to such an invention, is special in its signification, and somewhat different from what is meant when the term is applied to an invention consisting of a new device, or an entirely new machine.

I. e., in the latter case of the broad patent, anything which is an equivalent in function or effect will be covered by the patent, whether known as an equivalent or not, and whether patentably different or not; but in the other case, of a narrow patent, only an equivalent known to be such at the date of the patent will be covered by it.

In the case of Duff *v.* Sterling Pump Co., 107 U. S. 639, this same principle was again recognized. The Court said: —

The case is one, where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee . . . Todd was not a pioneer. He merely devised a new form to accomplish these results (Railway Co. *v.* Sayles, 97 U. S., 554) . . . The defendant adopts another form. Under *such circumstances* the Todd patent cannot be extended so as to embrace the defendant's form.

One of the most striking cases of this kind is that of Clough *v.* Barker, 106 U. S. 166; but the case has already been stated (*ante* pp. 35, 36), and we need do no more than refer to it in this connection.

It is to be borne in mind that the only anticipations proved or even alleged by the defendants are the Mackee, Humphrey and DeForest patents, and the Morrison protector, so called. It is clear beyond question that of these four alleged anticipations, but a single one, the DeForest, could by any possibility be regarded as meeting or limiting the claim of Miss Macdonald's patent. It is submitted that the examination of the DeForest patent (*ante* pp. 22, 24) shows clearly that it cannot limit the Macdonald patent. It follows that in 1873 she alone had ever conceived of the idea of a skirt protector. Even, therefore, if the Macdonald invention had not been made until the time of her application for a patent, if, in other words, the Court should not believe the testimony which carries her invention back to 1861, there is nothing in the prior art to limit her invention or the scope of her claim in any way. Her patent is, then, a "foundation patent," whether her invention goes back to 1861 or can only date from 1873, when she went into the Patent Office and asked for protection.

The general rule as to infringement was well stated by Judge Lowell in the case of Crompton *v.* Knowles, 7 Fed. Rep. 204, as follows: — "*The true question always is whether the defendant uses anything which the plaintiff invented.*"

If there be any exception to this rule it is found in those cases of a narrow patent for a combination of old elements, which have been noticed above. The present case does not belong to that class, the patent here in suit being for a new article, the first practicable skirt protector ever made, and therefore the general principle so well stated by Judge Lowell applies; for it is unquestionable that the defendants use something which the plaintiff's intestate invented.

B. F. BUTLER,
F. P. FISH,
Of Counsel for Appellee.

OPINIONS IN FORMER CASES.

NOTE: — The opinion of Judge Lowell in the present case is printed at page 102 of the Record.

MACDONALD *v.* CHASE, 6 O. G. 359.

Leggett, Commissioner: —

Priority of invention is to be awarded one of the above parties, upon the following issue: "A skirt protector having a fluted or plaited waterproof border."

Macdonald made this invention in 1861, and between that time and 1865, she attached waterproof skirt protectors to four of her own dresses.

Short dresses became fashionable in 1865, and therefore nothing more was done with this invention until the year 1872, when long dresses were again the style, and Macdonald then commenced experimenting preparatory to filing an application for a patent. This application was filed May 10, 1873, and accompanying the same was a model showing the fluted or plaited form of protector.

Chase manufactured plaited wiggan skirt protectors in the fall of 1872, but this material was objectionable, he says, because of noise attendant upon its use; it was not waterproof and not durable. In January, 1873, he tried haircloth, but discarded it as too expensive, and did not offer any protectors of this material for sale. In April, 1873, Chase suggested to several of his operatives that rubber cloth would be a good article for this purpose, but waited until September, 1873, before he put the rubber cloth protector on the market. Chase filed his application October 16, 1873.

From the proofs submitted, it is clear that Macdonald was

the first to invent, first to perfect, and first to apply for a patent, and is therefore justly entitled to priority.

Like many others in a similar predicament, Chase, emulating the fox in the fable, suddenly comes to the conclusion that this article, which he considered far superior to any in use, and swore that he believed it to be new and useful, is not of much account after all, and lacks both novelty and invention.

Chase's attorney makes a useless attempt to confound skirt facings with skirt protectors. These articles are entirely distinct in form, and are used for a different purpose. Enamelled cloth has been used for the former, but there is nothing in the record to show that it has been used for protectors.

Appellant refers to the patent of Lucinda Humphrey, dated April 22, 1862, wherein is claimed:

> A skirt protector, made substantially as described, and of any waterproof material, in combination with the lower portion of the petticoat.

Oil silk is the waterproof material specified in this patent, and a plain piece of the same is attached to the bottom of a petticoat. This material would be utterly worthless if allowed to drag.

The patent of J. A. Mackee, Jan. 10, 1865, is also referred to. No waterproof protector is shown or hinted at in this patent. Mackee has a waterproof facing, which only extends down as far as the edge of the dress skirt, and uses braid for a protector.

Chase also insists that Macdonald should not be allowed a patent, on the ground of abandonment. This conclusion can only be arrived at by an unwarrantable distortion of the plain meaning of Macdonald's testimony. She testifies that at the

time she made this invention, others had used waterproof facings, but nowhere does she say that waterproof protectors were then used.

The decision of the board, awarding priority of invention to H. M. Macdonald, is affirmed.

MACDONALD *v.* BLACKMER, 9 O. G. 746.

Shepley J., after quoting the claim of the patent as modified by disclaimer, said:

I see no reason to doubt that she was the first and original inventor of this article, as distinguished from a skirt facing, which is an entirely different article, and from a skirt protector, which being made of wiggan or other similar material, was substantially useless for the purpose as compared with the complainant's invention.

MACDONALD *v.* SEIDENBERG, 18 O. G. 193

BLATCHFORD J.

In the original case against Blackmer, Judge Shepley held that the plaintiff was the first and original inventor of a skirt protector having a fluted or plaited border, bound with, or composed of enamelled cloth or other waterproof material, as distinguished from a skirt facing (which he remarked was an entirely different article), and from a skirt protector made of wiggan or similar material, which was substantially useless for the purpose as compared with the plaintiff's invention. In the original Blackmer case the Mackee patent of Jan. 10, 1865, was introduced to defeat the plaintiff's patent; also the Mandell patent of May 19, 1874, application filed Nov. 26, 1873. The plaintiff's patent was granted Sept. 29, 1874, on an application filed May 10,

1873. The plaintiff carried the making of her invention back in the original Blackmer suit, to December, 1861. Various unpatented devices were introduced in that suit to anticipate the plaintiff's invention, but none of them were earlier in date than December, 1861. The defendants in the Blackmer suit were then allowed to set up the DeForest patent of Jan. 15, 1867, to defeat the plaintiff's patent by a supplemental answer, and further proofs were taken. Judge Lowell heard the case [against Blackmer] and held on the evidence that the plaintiff's invention was made in 1861; that the DeForest invention was later, and that the plaintiff's patent was valid. In the Blackmer case the defendant's article had specifically a fluted or plaited border.

Subsequently, the case of Macdonald *v.* Shepard came before Judge Lowell, in which the defendant's article, though like the plaintiff's in other respects, did not have a fluted or plaited border. Judge Lowell said that

> It was within the description of the plaintiff's patent, unless the fluted or plaited border was an essential part of the plaintiff's invention, so that a plain or straight border, not gathered into plaits, would be without the scope of the patent.

He further said:

> I understand the fluting or plaiting is merely a part of the finish proper, and perhaps necessary when the skirt to be protected is made of a certain shape — unnecessary when it is of another shape. It seems to me that both of the parties took for granted in that case [the Blackmer case] that a skirt protector not plaited would defeat the plaintiff's patent if proved to have been made before the date of her invention. I certainly so understood it in deciding upon the question raised by the discovery of the DeForest patent.

An injunction was granted.

The defendant's article, in the present case, does not have a fluted or plaited border, but it is like the plaintiff's article in all other respects. I concur with Judge Lowell in not regarding the fluted or plaited border as essential in view of the state of the art prior to the plaintiff's invention in December, 1861. The affidavits presented by the defendants in the present case do not show any article anticipating that date like the plaintiff's invention, whether with or without a fluted or plaited border. T. D. Day gives no date earlier than 1865. The article of 1858, which J. Morrison speaks of, was only a facing. His entire affidavit is too vague and general. H. Douglass, as to a skirt protector of enamelled cloth over a facing, gives as a date "as early as 1861." This is not sufficient. R. Hood goes back only to 1865. An injunction is granted.

116-593

SUPREME COURT U.S.
FILED
JAN 20 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 123.

JOHN SHEPARD, HENRY NORWELL AND ROBERT FERGUSON, AS SHEPARD, NORWELL & CO.,
APPELLANTS,

vs.

EDWARD C. CARRIGAN, ADMINISTRATOR OF HELEN M. MACDONALD. DECEASED,
APPELLEE.

SUPPLEMENTARY BRIEF FOR APPELLEE.

JUDD & DETWEILER, Printers.

Supreme Court of the United States.

No. 123.

SHEPARD *et al.*, APPELLANTS,

vs.

CARRIGAN, ADMINISTRATOR, APPELLEE.

SUPPLEMENTARY BRIEF FOR APPELLEE.

The appellants in their brief base their argument almost altogether upon the assumption that facings and protectors are one and the same thing. This has been the chief defence in all the litigation on this patent. The evidence is conclusive and uncontradicted that facings and protectors are radically different (appellee's brief, p. 4). The Commissioner of Patents so found, and Judge Blatchford, Judge Shepley, and Judge Lowell made the same findings as to the facts. This confusion on the part of appellants runs all through their brief, and vitiates its conclusion.

The appellants endeavor to show, 1st, that Miss Macdonald's letters to the Patent Office and her testimony in the various suits on her patent are inconsistent; that she states her invention differently at different times; and, secondly, that the Morrison "protector," so called, limits the Macdonald patent. We shall notice these points briefly.

In all of Miss Macdonald's communications to the Patent Office there is nothing which can be construed as inconsistent with the position which she and her successors have always maintained, namely, that she was the first inventor of a *skirt-protector*.

On page 10 of their brief the appellants, by quoting a part only of her letter to the Patent Office, and by italicizing words which she did not italicize, and by omitting italics where she used them, make her appear to say almost the opposite of what she really did say. (A true copy of the letter will be found in the record at page 143.)

According to the appellants' version she might appear to state that the only merit of her invention was using the raw edge, and that water-proof material had been used before for the same purpose that she used it. In fact, however, her letter begins as follows:

"I enclose a sample of Mackee's improvement in dress facing (green in color); also a sample of my improvement in *skirt-protectors* (black in color)," etc.

These italics are hers, and they show that she meant to distinguish between Mackee's skirt *facing* and her own *protector*. If Mackee invented a protector Macdonald would have no case; but the Office was wrong in referring Macdonald to the Mackee patent, and, practically, the appellants admit this, for the Mackee patent is scarcely mentioned in their brief, and it could not well be, for their own witnesses testify that the Mackee facing was used as a facing only. *Vide* page 21 of appellee's main brief.

Either the Mackee patent is destructive of the Macdonald patent or else it has no bearing upon it whatever. The evidence shows, and the appellants practically admit, that the latter is the case. It is then idle to suppose that the appel-

lee is to be prejudiced by the fact that the Patent Office wrongly referred Macdonald to the Mackee patent, especially as she never acknowledged that the Mackee patent, in any degree, anticipated her invention.

The appellants also argue that, inasmuch as Miss Macdonald carried back the date of her invention to 1861 by proving that she then used rough enamel cloth like the Morrison facing, and in the present case testifies that such cloth would be impracticable, therefore either she never made any invention or else the Morrison facing anticipated her.

We quote the following from the appellants' brief:

"She is reduced here to a dilemma. If an enameled cloth cannot make a protector, which she swears positively it cannot, then her patent is void for that reason; and it is especially void when she swears she knew what was a proper material and did not describe it. And the same swearing shows that her testimony in respect to her enameled cloth protectors worn for several years after 1861 is necessarily false, unless she can claim that she performs impossibilities. If, on the other hand, enameled cloth is a possible material for a skirt-protector, as she insisted in the Patent Office, although not the best nor very good, then the testimony is that other people, long before her, were using it for that purpose; and either horn of the dilemma is fatal."

The truth is that the rough enamel cloth, the only enamel cloth known till 1872, was better than any non-waterproof material, and up to that time there was no other non-waterproof material in the market; but now that the lighter and better finished enamel cloth which Miss Macdonald caused to be made before her patent issued can be obtained, the coarse kind, such as the Morrison facing, is, for commercial purposes, impracticable and worthless. It is to be borne in mind that Miss Macdonald had procured the

new kind of enamel cloth and filed samples of her protector made thereof before her patent issued.

All that Miss Macdonald means by her testimony is that it would be impossible for the Morrison facing, which had been sold in large quantities, to be used as a protector. This fact tended to show that it never had been so used, and that it had been sold for some other purpose, viz., for facings. She herself, however, having invented a *protector*, had been forced to use in her experiments a fabric which she recognized to be unsuitable for a commercially successful article.

This brings us to a consideration of the Morrison skirt "protector" itself. The appellants appear to base their case almost entirely on this article, and the appellee is willing to accept this as the vital issue in the case.

The testimony as to the Morrison article is as follows:

This article did not appear in the Blackmer case, but was exhumed for the purposes of the present suit. It is a strip of heavy, coarse enamel cloth, such as was used by carriage-makers.

The evidence in regard to it is as follows: James Morrison (Record, pp. 14, 16) testified that it was sold by his father's firm for two years between 1859 and 1861. He says:

> "We called them enamelled skirt facings or enamelled skirt-protectors, and sold them as such in Chambers street. They were used for facing the bottoms of ladies' dresses when they come in contact with the pavement. The article was enamelled cloth, the same as used by carriage-makers and upholsterers, cut in strips of about four and a half inches. *I should say, at least, we sold over a thousand pieces.* (Int. 9.)

And he produces a specimen, not one of the articles sold, but one which is, he says, similar to them. (Int. 11, X-Int. 13.) It is marked Morrison Skirt-Protector, 1859.

The most significant part of this testimony is that the counsel for the defendants did not ask this question, *i. e.*, "Was this strip of enamel cloth intended to project below the edge of the dress, and serve as a *protector* for the dress, and did it so project in actual use?" He carefully avoids any inquiry that might bring out the character of this article in those particulars which distinguish a facing from a protector. Both counsel and witness were silent on these, the vital, points. The witness says indeed that "they were used for facing the bottom of ladies' dresses when they come in contact with the pavement," but this remark might be made of any facing. Of course if a dress were allowed to drag in such a way that a considerable part of the inside of the skirt rested on the ground the facing would touch. Moreover the witness said (X-Int. 27) * * * "parties buying the goods would ask how they should be used, and we would have to explain the manner in which they were to be worn." He was then asked (X-Int. 31):

"How did you explain to those parties how the goods were to be worn?"

And he answered:

"Told them to sew them on to the bottom of the skirt."

And that, according to his own statements, is the only direction the Morrisons gave to the users of this Morrison skirt "protector." There is not a particle of evidence to show that this device was ever used except as a facing.

The next witness is Henry Douglass, and the same criticism applies to his testimony as to that of Morrison. It is silent on the vital points. He purchased the strips of enamel cloth that the Morrisons sold. He produces a specimen which he had kept in his store for eight years, and it is

marked "Exhibit Douglass Skirt-Protector." The most that he can say is as follows:

"Int. 9. Were they sold for any other purpose than protecting the lower parts of the skirts of ladies' dresses, so far as you know?

"Ans. They were not. All I ever bought them for was for that purpose, and I sold them for that purpose."

There is clearly nothing here which tends to show that the Morrison facing was ever used as a protector A facing is put on the lower part of a skirt, and it would be perfectly easy for the witness to answer yes, with regard to any facing, when asked if it was not used to protect the lower parts of the skirts of ladies-dresses.

The next witness is Geo. Garrett. He was employed by the Morrisons. He testifies that the Morrison "skirt-protector" was sold, he thinks, "from 1863, more or less, till 1870" (Int. 8), whereas Morrison himself testifies that they sold it for two years, from 1859 to 1861. This is the only remarkable point in his testimony. Like Morrisson and like Douglass he is silent on the vital points and his testimony adds nothing to theirs.

The witness Day (Rec., p. 22) testifies that the Morrison skirt-protector had been on the market for over twenty years, but he gives no evidence to show and does not assert that it was used as a protector in the true sense of that word.

He says (Int. 12):

"After having seen one or two dresses which contained enamelled cloth of that present time a blind man could generally tell by the rattling noise made on the pavement when such a piece of goods was passing by in a lady's dress as a protector."

But he nowhere says that he ever knew the Morrison

article to project below the edge of the dress or to differ in use or function from other facings, and it is plain that when a long dress was trailed at any length on the pavement a facing of heavy enamel cloth would make "a rattling noise."

This witness, then, says nothing from which it could even be inferred that the Morrison facing was used as a protector, although he is ready to swear that this "Morrison Skirt-Protector, 1859," would make a suitable binding for a dress of silk or satin (X Int. 29), and that there is no difference between a facing and a protector (X Int. 76.)

The witness Serrell (Rec., p. 41) also conspicuously fails to testify that the Morrison facing was ever used as a protector in the sense in which the Macdonald device is a protector, or that it differed at all, except in the character of the fabric, from other facings.

It is submitted that upon this evidence Judge Lowell's comment is well within bounds. He said:

"The evidence in this case brings out very clearly that enamelled cloth was used for protecting skirts a long time ago, and perhaps before 1861, but it is not proved to my satisfaction that it was used as a protector in the present sense. I think it was probably made into facings. The evidence of the witnesses who sold it is not, and could not well be, very distinct upon this point, as they were none of them women or dressmakers."

With one exception these witnesses were not even retail dealers, but sold at wholesale, and could know but little of the way in which the facing was used.

Why is it that the defendants do not offer the testimony of a single dressmaker, or of a single woman, to show that the Morrison facing was used as a protector?

In other words, we believe Judge Shepley's decision to be that she was the inventor of skirt-*protectors*. As to "fluting" and "plaiting," Judge Lowell says that in the Blackmer case, the one in which Judge Shepley's opinion was rendered, "both parties took for granted that a skirt-protector not plaited would defeat the plaintiff's patent if proved to have been made before the date of her invention."

The statement—page 26 of appellee's brief—that the owner of the De Forest patent "stopped" the manufacture of Macdonald's supporters is, we believe, entirely without basis in the record; certainly, the reference given (p. 312) does not support it.

Copies of the Macdonald patent are bound in with this brief.

B. F. Butler,
F. P. Fish,
Of Counsel for Appellee.

116 599

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885

No. 116.

JOHN H. MING AND JOHN KINNA, PLAINTIFFS IN ERROR,

vs.

ALEXANDER M. WOOLFOLK.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 14, 1882.